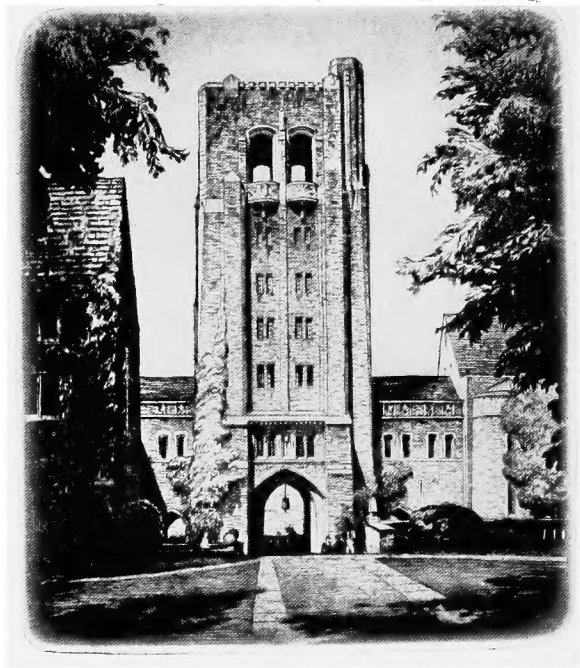


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THE  
LAW AND PRACTICE OF  
BANKRUPTCY IN  
CANADA







THE LAW AND PRACTICE  
OF  
BANKRUPTCY IN CANADA

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BEING THE BANKRUPTCY ACT (9-10 GEO. V. C. 36), THE BANKRUPTCY  
ACT AMENDMENT ACT, 1920 (10 GEO. V. C. 34), THE BANKRUPTCY  
ACT AMENDMENT ACT, 1921 (11-12 GEO. V. C. 17), AND THE  
GENERAL RULES AND FORMS FULLY ANNOTATED AND  
CROSS-REFERENCED, TOGETHER WITH CERTAIN CHAPTERS  
ON SOME ASPECTS OF BANKRUPTCY LAW.

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By  
LEWIS DUNCAN, B.A.,  
Of Osgoode Hall, Barrister-at-Law.

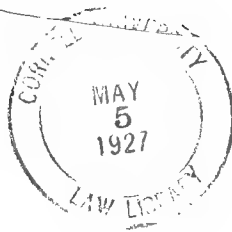
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## PREFACE

Bankruptcy legislation is part of the settled jurisprudence of every great commercial country. All the great states of Europe have their bankruptcy or insolvency codes. England has not been without a Bankruptcy Act since 1542. In the United States the tradition has not been so uniform, for the subject of Bankruptcy, like that of Banking, has from time to time featured in politics.

Bankruptcy legislation was introduced into Lower Canada in 1839; into the Province of Canada in 1843; and into several of the other Provinces at an early date. After Federation the Dominion had for a time a general Bankruptcy law, but this was repealed in 1880. From 1880 to 1919 there was no general Bankruptcy Act in force throughout Canada. The result was diversity of law in nine Provinces, and the absence of any Dominion-wide system under which the debtor's property wherever situate could be seized, and administered for the benefit of all his creditors.

The Bankruptcy Act of 1919 follows in the main the English Act of 1914. Two differences may be noted: that under our Act an authorized assignment takes the place of a petition presented by the debtor himself; and that our Act extends to companies. Amendments are yet required to make the Bankruptcy Act fully applicable to all the circumstances of company liquidation; but the advantage is obvious of having one code instead of two. Two codes, especially when in covering the same ground they contain different provisions on such important matters as priorities, fraudulent preferences and fraudulent conveyances, tend to obscure the law.

Every Bankruptcy law is ultimately judged by its administration in two respects. First, the administration of the estate of the debtor by the Trustee.



The system of administration by authorized trustees, introduced by the Act of 1919, is an improvement on that under the Insolvent Acts of 1869 and 1875 and will, it is to be hoped, render impossible some of the abuses which crept in under that system.

Secondly, the administration of the discharge and offences provisions of the Act. These provisions are administered strictly in England. In neither England nor the United States is the system so strict as in France. To become a *fallite* in France involves consequences which, were they introduced in Canada, might tend to prevent the authorized assignment provisions of our Act from being looked upon as a benevolently created clearing house for liabilities. Still, if the discharge and offences provisions of the Act are known to creditors, and are invoked where applicable, the lot of the fraudulent debtor will not be an enviable one.

While certain amendments are required to the Bankruptcy Act, there should be no reason to anticipate an irritating series of annual alterations. The principles of the English Act of 1883 are found in substance in the English consolidation of 1914. It is fair to assume that we can evolve a code suited to our conditions which will not require constant legislative tinkering.

Until there is a body of Dominion law on Dominion subjects the function of any commentary on a Dominion Statute must be that of presenting to the practitioner in the different provinces the decisions in his own and other jurisdictions. It is, therefore, considered that no apology is required for the citation of English decisions which do not come within the rule in *Trimble v. Hill* (1879) 5 A. C. 342. Though not binding on our courts, they are decisions by eminent judges on a bankruptcy code on which our Act is framed. Canadian cases down to those published up to October, 1921, have been incorporated. Leading English cases to the same date of publication have also been included.



It is a matter of regret to the author that, owing to prevailing prices, the publishers have not seen their way clear to print the French text of the Act and Rules. It is hardly necessary to remark that that text can be used throughout Canada alternatively with the English.

The author wishes to express his thanks to Messrs. C. P. Halliday and R. I. Ferguson for the care they have devoted to the reading of proofs and the preparation of the Table of Cases.

In commending this volume to the indulgence of the profession, the author will take it as a kindness if those who come across errors or omissions will be good enough to bring them to his attention.

L. D.

Toronto, 38 King Street West.  
*January, 1922.*







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1. (1) a	3. a	(11)	(10)
b	b	(12)	(11)
c	c	(13)	(12)
d	d	(14)	
e	e	(15)	(13)
f	f	(16)	(14)
g		(17) (18)	(15)
h		(19)	(16)
		(20)	(17)
	2. (o)	17.	13. (19)
(2)		18.	
2.	4. (5)	19.	
3.	4. (3)	20.	43.
4. (1)		21.	13. (18)
(2)		22. (1)	54. (3)
5. (1)	4. (2)	(2)	(4)
(2)	4. (5)	(3)	(5)
(3)	(6)	(4)	(6)
(4)		23. (1)	55. (1)
(5)	(7)	(2)	(2)
(6)	(8)	24.	57.
(7)	(9)	25. (1)	56. (1) (4)
6.		(2)	(2) (5)
7. (1) (2)	6. (1)	(3)	(2) (5)
8.	5.	(4)	(7)
9. (1)	7. (1)	(5)	(8)
(2)		(6)	
10. (1)		26. (1)	58. (1)
(2) (3)		(2)	(4) (5)
		(3)	59.
11.	11. (4)	(4)	60. (3)
12.	see 6 (4)	(5)	60. (1)
13.	42. (1)	(6)	(2)
14. (1) (2)	54. (1)	(7)	58. (2) 60 (4)
(3)		(8)	60. (6)
(4)	(2)	(9)	
15. (1) (2)	see 56 (1)	27.	60. (7)
(3)		28. (1)	61. (1)
(4)		(2)	(2)
(5) (6)		(3)	(4)
(7)		(4)	(3)
(8)		29. (1)	62. (1)
(9) (10)		(2)	(2)
16. (1)	13. (1)	(3)	(3)
(2) (3)	(3)	(4)	(4)
(4)	(4)	30. (1)	44. (1)
(5)	(5)	(2)	
(6)	(6) (7)	(3)	44. (2)
(7)		(4)	(3)
(8)	(7)	(5)	
(9)	(8)	(6) (7) (8)	
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(2)		61.	22. (1)
(3)	51. (2)	62. (1) (2) (3)	37. (1)
(4)		(4) (5)	(2)
(5)		63. (1)	(4)
(6)	51. (3)	(2)	(5)
(7)	(4)	64.	
(8)	(5)	65.	37. (3)
(9)		66. (1) (2)	
34.		67. (1) (2)	37. (6) (7)
35.	see 52	68.	37. (9)
36. (1)	48. (1)	69.	38.
(2)	(2)	70.	
37. (1) (2)	4. (10)	71.	
38. (1)	25. (1)	72.	
2 (a) (b)	(2)	73.	
(c)		74.	
39.		75.	
40. (1) (2)	11. (1) (2)	76.	16.
41. (1) (2)	(3)	77. (1) (2)	15. (2)
42.	29.	78.	
		79. (1)	
43.	30.	(2)	42. (3)
44. (1)	30. (1)	(2)	
(2)		(4)	
(3)			
45.	32.	80.	39.
46.		81.	
47.	34.		
48. (1) (2)	17. (1) (2)	82. (1) (2) (3)	40. (1) (2) (3)
(3) (4)		(4)	
(5) (6)		(5)	
49.		83. (1)	
50.		(2)	
51.		(3)	
52.		(4)	
53. (1) (2)			
(3)	6. (3)	84.	
(4)		85.	
54.		86.	23.
	but see	87.	
55. (1)	52. (5)	88.	26. (3)
(2)	20. (1) (a)	89.	
(3)		90.	
(4)		91.	
(5)		92.	
56. (1)	20. (1) (b)	93.	
(2)	(c)	94.	
(3)	(d)	95. (1)	15. (1)
(4)	(e)	(2)	
(5)	(f)	96.	
(6)	(g)	97.	
(7)	(h)	98.	
(8)	(i)	99.	
(9)	(j)	100.	
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58.	21.	102.	65.
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(4)		(2)	(b)
(5)		(3)	(c)
106.		(4)	(d)
107.		(5)	(e)
108. (1)	74. (1)	(6)	(f)
(2)		(7)	(g)
(3)		(8)	(h)
109. (1)	68. (2)	(9)	(i)
(2)	(3)	(10)	(j)
(3)	(4)	(11)	(k)
(4)	(5)	(12)	(l)
(5)	(6)	(13)	(m)
110.	(7)	(14)	(n)
111.	(8)	(15)	(o)
112.	(9)	(16)	(p)
113.	(10)	155.	90.
114.	69. (1)	156.	
115.	(2)	157.	
116.	(3)	158.	91.
117.	70. (1)	159.	
118.	(3)	160.	
119.	(2)	161.	93.
120.		162.	94.
121.	71. (1)	163.	95. (1) (2)
122.	71. (2)	164. (1)	
123. (1)	72. (1)	(2)	
(2)	(2)	(3)	
124.	73.	(4)	95. (3)
125.	75.	165.	
126.		166.	
127.	76.	167.	2.
128.		168.	
129.		169.	98.
130.			
131.			
132.	66.		
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134.			
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136.			
137. (1)	77. (3)		
(2)	(4)		
138. (1)	(1)		
(2)	(2)		
139.	78.		
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141.	81.		
142.	80.		
143.			
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4.		
5.		42. (3)
6.		(4)
7.		(5)
8.		(9)
9.		
10.		(10)
11.		(11)
12.		
13.		
14.		(12)
15.		(13)
16.		(13)
17-18.		
19.		
20.		
21.		



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23.	(6)	19.	47.
24.	(7)	20.	
25.	(8)	21.	49
26.		22.	50.
27.		23.	
28.		24.	
		25.	53. (3)
		26.	
		27.	
		28.	

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1.	45. (1)
2.	(2)
3.	(3)
4.	(4)
5.	(5)
6.	(6)
7.	
8.	
9.	46. (1)
10.	46. (2)
11.	(3)
12.	(4)
13. (a)	(5)
(b)	(6)
(c)	(8)
14.	(9)
15.	(7)
16.	(10)
17.	

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6	4	73	43	188	96
7	5	80	44	189	97
8	6	81	45	200	98
10	7	82 (1)	46	205	99
11	8	82 (2)	47	204	100
12	9	85	48	206	101
14	10	87	50	207	102
18	11(1)	88	51	208	103
22	11(2)	89		211	104
24	12	90	52	216	105
26	14	91	53	219	106
27	15	96	54	228	135 (1) (2)
28	16	98	56	229	136
32	17	103	57	231	137
33	18	112	58	232	138 (1)
35	19	114	59	233	139 (1) (2)
37	20	121	60	234	140
38	21	122	63	236 (1)	141 (1)
39	22	124	64	236 (2)	141 (2)
40	23	126	65	237	142
41	25	130	68 (1)	238	143
46	24	131	68 (2)	239	144
49		133	69	243	112 (1)
50	26	134	71	248	112 (2)
51		145	74	251	115
53	27	150	75	261	116
54	28	151	76	262	117
55	29	155	77	263	118
56	30	156	78	279	80
58	31	157	79	280	81
60	33	158	83	285	94
61	34	159	84	286	95
62		160	85	287	97 (2)
63	35	165	86	290	95
64		169	87	383	145
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66	37	171	89		
67		174	90		
68	38	175	91		







# THE LAW AND PRACTICE OF BANKRUPTCY IN CANADA

## CHAPTER I.

### BANKRUPTCY AND INSOLVENCY.

By section 91(21) of *The British North America Act*, 1867<sup>1</sup>, the Parliament of Canada has exclusive legislative authority over "Bankruptcy and Insolvency"<sup>2</sup>. Chapter I.

The word "bankrupt" was originally applied in England only to fraudulent persons<sup>3</sup>. Thus (1542), 34 & 35 Hy. VIII., c. 4, the first English Bankruptcy Statute, was directed against such "persons as do make bankrupt", that is to say persons "who craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties". The word has undergone various transfers of sense<sup>4</sup>, and now in a

<sup>1</sup> 30-31 Vic. c. 3 (Imp.).

<sup>2</sup> Murray in the *New English Dictionary* (Oxford, Clarendon Press, 1883), derives the word bankrupt from the Italian *banca rota* (Florio) which is literally "bank broken" or "bench broken." The allusion is said to be to the custom of breaking the table of a defaulting tradesman. Cf. for derivation Coke Institutes IV. 63; Blackstone Comm. Vol. II., pp. 285, 472. More in 1533 Apol. XXI. Wks. 881/2 uses the word "bancke roughtes."

<sup>3</sup> This distinction is still observable in the use of the corresponding word in French law. See *infra*, Chap. V., Bankruptcy Administration.

<sup>4</sup> See Murray *op. cit.* In law the actual state of bankruptcy is often judged by the acts and not by the capacity of the debtor. See (1542) 34 and 35 Hy. VIII. c. 4. The enumeration of what acts should cause a person to be deemed a bankrupt was extended by (1570), 13 Eliz. c. 7. Article 23 of the Civil Code of Quebec defines bankruptcy as the condition of a trader who has discontinued his payments. Compare French Code de Commerce Art. 437. Under the *Bankruptcy Act* a man is a bankrupt only when he has been so adjudged. Sec. 4(5). The adjudication will be made on proof that the debtor has committed an "act of bankruptcy," sec. 3, and that he owes the petitioning creditor or creditors debts aggregating five hundred dollars. Sec. 4.



Chapter I. popular sense means an insolvent debtor, or one who is unable to meet his liabilities, whether he has been declared a bankrupt or not, irrespective of the nature of the transactions in which he has indulged<sup>5</sup>. The derivative "bankruptcy" now means either the state of being bankrupt or the fact of becoming bankrupt<sup>6</sup>.

"Insolvency" means the state or condition of being unable to pay one's debts or discharge one's liabilities<sup>7</sup>.

Apart from these questions of definition, historical reasons exist for the use of the two words in section 91(21) of *The British North America Act*. There have been both bankruptcy and insolvency statutes in England since (1729), 2 Geo. II., c. 22. The distinction between bankruptcy and insolvency legislation was also recognized in nearly all the colonies which now are provinces of Canada<sup>8</sup>. Bankruptcy legislation as so understood, applied only to traders, and provided for the discharge of the trader from his past debts<sup>10</sup>.

The insolvency statutes were for the relief of insolvent non-traders imprisoned<sup>1</sup>, at the instance of their creditors, for non-payment of their debts. These statutes<sup>2</sup> provided for the release from imprisonment of

<sup>5</sup> See Murray *op. cit.*

<sup>6</sup> Murray *op. cit.*

<sup>7</sup> From in-solvere, to loosen or pay.

<sup>8</sup> Murray *op. cit.* In *L'Union St. Jacques de Montreal v. Belisle* (1874), L. R. 6 P. C. 31, 36, Lord Selborne, speaking of general laws governing *faillite*, bankruptcy and insolvency, says: "The words described in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation." The question of definition is fully canvassed in the Court of Appeal for Ontario in *In re Assignments and Preferences Act* (1893), 20 O. A. R. 489. The decision of the Court of Appeal was reversed (1894), A. C. 187.

<sup>9</sup> See Chapter II.

<sup>10</sup> While the earlier bankruptcy statutes such as (1542) 34 and 35 Hy. VIII. c. 4, and (1571) 13 Eliz. c. 7, treated the debtor as a criminal whose property might be seized and whose person imprisoned, a change was made by (1705) 4-5 Ann c. 4, and provision was made not only for the discharge of the debtor from prison, but also for his discharge from liability for past debts.

<sup>1</sup> Usually under a writ of *capias ad satisfaciendum*.

<sup>2</sup> The early statutes (1729) 2 Geo. II. c. 22; (1730) 3 Geo. II. c. 27; (1735), 8 Geo. II. c. 24; (1741) 14 Geo. II. c. 34; (1748) 21 Geo. II. c. 33; (1756) 29 Geo. II. c. 28; (1758) 32 Geo. II. c. 28, were at



the debtor, but the debtor was not freed from his liability<sup>2</sup>. Chapter I.

In addition to this historical distinction between Bankruptcy and Insolvency legislation, the article in the Constitution of the United States, which corresponds with section 91(21) of the B. N. A. Act, was no doubt before the drafters of the B. N. A. Act. By Article 1, section 8 of that Constitution, Congress was given power to "establish uniform laws on the subject of bankruptcies throughout the United States". It had been contended that under this Article Congress had no jurisdiction on the subject of insolvency; but although there had been some decisions, it could not be said that the point had been determined<sup>4</sup>.

All these considerations, no doubt, had their influence in determining the wording of section 91(21).

first temporary in their nature and partial in operation. The first permanent and comprehensive statute was (1813) 53 Geo. III. c. 102. See also (1820) 1 Geo. IV. c. 119; (1822) 3 Geo. IV. c. 123; (1824) 5 Geo. IV. c. 61; (1826) 7 Geo. IV. c. 57; (1838) 1 & 2 Vic. c. 110; (1842) 5 & 6 Vic. cc. 116, 122; (1844) 7 & 8 Vic. cc. 70, 96; (1845) 8-9 Vic. c. 96; (1847) 10-11 Vic. c. 102; (1868-9) 32-33 Vic. c. 83. The law of bankruptcy under which for example a debtor might obtain a discharge, was first applied to non-traders by the Act of 1861, 24 and 25 Vic. c. 134: See Wharton, Law Lexicon, 10th edition, 1902; Stevens & Sons *sub tit.* Bankruptcy, Insolvency. The Roman Law never established any distinction between traders and non-traders. In respect of the continuing obligation of the bankrupt it resembled the English law of insolvency—Gaii Institutionum Juris Civilis by Edward Poste, M.A., Oxford, Clarendon Press, 2nd edition, 1875, at p. 342, III. s. 77. In France the bankruptcy provisions of the Code de Commerce apply only to traders: see Arts. 437, 541, and unless a composition is agreed to there is no discharge or rehabilitation until the bankrupt had paid in full principal, interest and costs: Art. 604. No discharge short of payment in full is provided by the assignment provisions of the French Civil Code: Arts. 1265-1270. Nor is there in German law any discharge in the English sense. See evidence of Dr. E. J. Schuster at pp. 255-261 and pp. 234-240 of Report of the committee appointed by the Board of Trade to inquire into the bankruptcy law and its administration, *cd.* 4068 (1908) H. M. Stationery office.

<sup>2</sup>The reason for this early distinction in treatment between traders and non-traders was, no doubt, the fact that the fortunes of traders were subject to the perils of the sea and the fluctuations of the markets to a degree in which others were not. Cf. Blackstone Comm., Vol. II., p. 473.

<sup>4</sup>In *Sturges v. Crowninshield* (1819), 4 Wheat 122, an elaborate argument was founded on the distinction between bankruptcy and insolvency; but Marshall, C.J., did not commit himself to the distinctions which had been made, namely that laws which liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws, and that insolvent laws operate at the instance of the debtor; while bankrupt laws operate at the instance of the creditor. See also *Ogden v. Saunders* (1827), 12 Wheat 212.



## CHAPTER II.

HISTORY OF BANKRUPTCY AND INSOLVENCY LEGISLATION  
IN CANADA PRIOR TO CONFEDERATION.Chapter II.

The history of Bankruptcy and Insolvency legislation in Canada falls naturally into two periods, namely: legislation prior to Confederation and legislation after that date<sup>1</sup>. In this chapter it is proposed to outline the history of such legislation prior to Confederation in the Maritime Provinces, Quebec and Ontario, Manitoba and the North Western Territories, and British Columbia and Vancouver. In the next chapter the legislation subsequent to Confederation is traced.

*(a) The Maritime Provinces.*

The Maritime Provinces have always been treated as colonies by settlement as distinguished from colonies obtained by conquest or cession<sup>2</sup>.

The theory of the common law is that in colonies by settlement the settlers carry with them so much of the English common and statute law<sup>3</sup> as is reasonably applicable to the conditions of the colony<sup>4</sup>. No deci-

<sup>1</sup> In this Chapter no more than a survey of bankruptcy and insolvency legislation is attempted. It is not pretended that the statutes cited are exhaustive of the legislation.

<sup>2</sup> Clement, Canadian Constitution, 3rd ed., 1916, p. 276. See (1759), 33 Geo. II. c. 3 (Nova Scotia).

<sup>3</sup> A distinction is sometimes made between the introduction of the common law and of statute law; and the rule governing the introduction of these two portions of English law has been variously expressed in the different colonies which are now provinces of the Dominion. The distinction is important, as the English law with respect to bankruptcy and insolvency is statutory. In the leading case of *Uniacke v. Dickson* (1848), James N. S. R. 287, Haliburton, C.J., decided that in Nova Scotia the whole of the common law was introduced, with the exception of such parts as were obviously inconsistent with the circumstances of the country, while only such parts of the statute law were introduced as were obviously applicable and necessary. In New Brunswick the rule with regard to the admission of statutory law seems not to have been so strict; the tendency being not to reject any statute unless clearly inapplicable; Clement: Canadian Constitution, 3rd ed., Carswell Co., Ltd., 1916, p. 282, and cases there cited.

<sup>4</sup> Per Watson, L.J., in *Cooper v. Stewart* (1889), 58 L.J.P.C. 93; *Walker v. Walker* (1919), A. C. 947, 951; Blackstone, 1 Comm. 107.



sion has, however, been found on the question whether the bankruptcy and insolvency laws of England were introduced into the Maritime Provinces on settlement<sup>5</sup>, or on the other question whether as the population, wealth and commerce of the colonies increased such laws were attracted to them<sup>6</sup>. Chapter II.

No bankruptcy legislation appears to have been passed in Nova Scotia prior to Confederation, though an Act for the Relief of Insolvent Debtors was for many years on the Statute books<sup>7</sup>; and an Act (1862), 25 Vic. c. 2, was passed providing for the Incorporation and Winding-up of Joint Stock Companies.

Chapter 124 of the Revised Statutes of New Brunswick, 1854, is an Act with respect to Insolvent Confined Debtors. This was amended by (1860), 23 Vic. c. 28; and by (1863), 26 Vic. c. 10. In 1864 a Winding-up Act, 27 Vic. c. 44, was passed. All these statutes are reprinted in the 1877 Consolidation of the Statutes of New Brunswick.

In Prince Edward Island various statutes were passed with respect to the relief of Insolvent Debtors: (1786), 26 Geo. III. c. 2; (1836), 6 Wm. IV. c. 9; (1844), 7 Vic. c. 3; (1848), 11 Vic. c. 27. These statutes were all repealed in 1851 by 12 Vic. c. 2, which Act consolidated the laws with respect to insolvent debtors. That Act was amended by (1860), 23 Vic. c. 16, s. 75; and by (1862), 25 Vic. c. 6, s. 9, which extended the benefit of the provisions of *The Insolvent Act* to all persons confined within any jail for any debt, damages or costs. In 1868, that is to say, prior to the entry of Prince Edward Island into Confederation, the Assembly passed 31 Vic. c. 15, entitled an Act for the Relief of Unfortunate Debtors, which provided for the discharge of the debtor from his liabilities.

<sup>5</sup> See, however, as to 13 Eliz. c. 5, respecting Fraudulent Conveyances, a statute passed in the same year as the *English Bankruptcy Act*, and often regarded as a part of the Bankruptcy Code: *Tarrett v. Sawyer* (1835), 1 Thomp. N. S. R. 46 (2nd ed.); *Moore v. Moore* (1880), 13 N. S. R. (1 R. & G.) 525; *Graham v. Bell* (1884), 17 N. S. R. (5 R. & G.) 90.

<sup>6</sup> See *per Watson, L.J.*, in *Cooper v. Stewart*, *supra*.

<sup>7</sup> See R. S. N. S. (1851), c. 137; R. S. N. S. (1864), c. 137.



(b) *Quebec and Ontario.*Chapter II.

The effect of the cession of Canada to England was to introduce that portion at least of the public law of England which has to do with the allegiance of the subject<sup>8</sup>, but to leave the private law unchanged, except so far as it was irreconcilable with the fundamental principles of English public policy<sup>9</sup>. As Bankruptcy and Insolvency law appertains to the division of private and not public law the English law on these questions was not introduced into Canada by the Cession.

In October of 1763, after the Treaty of Paris, Geo. III. issued a Royal Proclamation declaring that until assemblies should be constituted, all persons in the ceded territories "may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England". Whether or not this Proclamation and the subsequent Ordinances of General Murray had the effect of introducing the whole of English law is an undecided point on which considerable difference of opinion exists<sup>10</sup>.

The question is, however, of little importance from the point of view of bankruptcy and insolvency legislation, for section 8 of (1774), 14 Geo. III. c. 83, an Act for making more effectual provision for the Government of the Province of Quebec<sup>11</sup>, provided that in

<sup>8</sup> Public law regulates the rights between State and subject; private law the rights between subject and subject: Holland, *Jurisprudence*, 12th ed., 1916, Stevens & Sons, pp. 128, 366 *et seq.* As to whether the criminal law was thus introduced; *quære*.

<sup>9</sup> *Tremblay v. Despatie* (1921), 37 T. L. R. 395; *Ruding v. Smith* (1821), 2 Hagg (Consist), 371, 382; *Campbell v. Hall* (1774), 1 Cowper 204; *cf. Durocher v. Degre* (1901), R. J. Q. 20 S. C. 456, 475 *et seq.*; *Stuart v. Bowman* (1853), 3 L. C. R. 309; *Wilcox v. Wilcox* (1857), 8 L. C. R. 34.

<sup>10</sup> *In re Marriage Laws* (1912), 46 S. C. R. 132, 217, 403; Clement, *Canadian Constitution*, 3rd ed., 1916, pp. 19(n1), 283. See *Lemieux, Les Origines du Droit Franco-Canadien*, pp. 363, *et seq.*; Walton, *The Scope and Interpretation of the Civil Code of Lower Canada*, Montreal, Wilson & Lafleur, 1907; pp. 7-19; Garneau *Histoire du Canada*, Vol. 3, p. 308; Lareau *Histoire du Droit Canadien*, Vol. 2, p. 45; Kingsford, *History of Canada*, Vol. V., p. 235n; Masères, F., in *Canadian Freeholder*; "A View of the Civil Government and Administration of Justice in the Province of Canada while it was subject to the Crown of France," 1 L. C. Jurist, appendix; *Wilcox v. Wilcox* (1857), 8 L. C. R. 34.

<sup>11</sup> The statute extended the boundaries of the Province of Quebec to the Mississippi in the South-West, and, in the North-West, to the territory granted to the Merchant Adventurers of England trading to Hudson's Bay.



all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same. The laws of Canada thus established consisted of :— Chapter II.

(a) The *Coutume de Paris*, and the ordinances in force within the jurisdiction of Paris prior to 1663, unless clearly not intended to have effect outside France.

(b) The *Arrets du Conseil du Roi* and the ordinances published between 1663 and 1763 registered by the Council of Quebec.

(c) The ordinances of the administrative authorities in Canada, especially those of the Intendants.

(d) The judgments of the courts<sup>12</sup>.

Eighteen years later, that is to say in 1792, owing to the increase in the English speaking population on the shores of Lake Ontario, the Province of Quebec was divided into the Provinces of Lower and Upper Canada (now Quebec and Ontario).

In Lower Canada the laws of Canada remained without change until 1839, when an ordinance was passed entitled "An Ordinance concerning bankrupts and the administration and distribution of their estates and effects"<sup>13</sup>. This Ordinance introduced into Quebec a general Bankruptcy Act based on the English law. It applied only to traders, was administered by commissioners, and provided for the discharge of the debtor from his liabilities.

The first Act of the Parliament of Upper Canada (1792), 32 Geo. III. c. 1, declared that thereafter in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same, but section 6 of the Act provided that nothing in the Act contained should introduce any of the laws of England respecting the maintenance of the poor, or respecting bankrupts. The question, therefore, as to whether English bankruptcy laws were at this time introduced into Upper

<sup>12</sup> Walton, the Scope and Interpretation of the Civil Code of Lower Canada, p. 5.

<sup>13</sup> (1839), 2 Vic. c. 36.



Chapter II. Canada is concluded in the negative. The Parliament of Upper Canada made no provision for bankruptcy laws, but several Acts were passed for the relief of insolvent debtors<sup>1</sup>.

Difficulties developed in the administration of the two provinces. They were accordingly re-united by a Proclamation issued under (1840), 3-4 Vic. c. 35 (Imp.). During the union, which lasted until Confederation, both bankruptcy and insolvency statutes were passed.

First as to bankruptcy legislation. In 1843 the Parliament of Canada passed a general bankruptcy law (1843), 7 Vic. c. 10 (Can.)<sup>2</sup>. This Act repealed the Ordinance of 1839, and was applicable throughout the whole Province. It extended only to traders. It made provision for the discharge of the debtor. Section 75 of the Act provided for matters not otherwise specifically dealt with as follows:—

“And be it enacted that in all questions not otherwise provided for the laws of Upper Canada and of Lower Canada, respectively, shall be resorted to as the rule of decision in all questions respecting bankrupts, as the said laws now respectively obtain in each section of the Province, and in cases unprovided for in the existing laws above mentioned, then resort shall be had to the laws of England, as such rule of decision in that part of this Province heretofore Upper Canada, and that only”<sup>3</sup>.

Three years prior to Confederation the Act of 1843 and amending Acts expired<sup>4</sup> and were replaced by the so-called *Insolvent Act* of 1864<sup>5</sup>. In so far as it provided for the discharge of the debtor from his liabilities, it was bankruptcy rather than insolvency legislation. In Lower Canada it applied to traders only; in

<sup>1</sup> See (1805), 45 Geo. III. c. 7; (1822) 2 Geo. IV. c. 8; (1827) 8 Geo. IV. c. 8; (1830) 11 Geo. IV. c. 4; (1834) 4 Wm. IV. c. 3; (1835), 5 Wm. IV., c. 3; (1840), 3 Vic. c. 6.

<sup>2</sup> This Act was amended by (1846) 9 Vic. c. 30; (1849), 12 Vic. c. 18; (1850), 13-14 Vic. c. 20, and was continued in force until after the passing of the *Insolvent Act* of 1864.

<sup>3</sup> As to whether this introduced substantive law or merely the principles of adjective law see *per* Robinson, C.J., in *Maulson v. Commercial Bank* (1846). 2 U. C. Q. B. 338, 346 *et seq.*

<sup>4</sup> See (1864), 27-28 Vic. c. 24.

<sup>5</sup> 27-28 Vic. c. 17.



Upper Canada to all persons. It provided both for Chapter II.  
voluntary assignments and compulsory liquidation, and for deeds of composition and discharge<sup>6</sup>. The Act was amended by 29 Vict. c. 18, and was the last legislation on this subject prior to Confederation by the Parliament of the Province of Canada.

In insolvency matters the Parliament of the Province of Canada passed separate Acts with respect to Upper and Lower Canada. Chapter 96 of (1858), 22 Vic. (1st session), was applicable only to Upper Canada. It provided for the release from imprisonment of a debtor, giving the Court power to make it a condition of the debtor's discharge that he should make an assignment of his property<sup>7</sup>. It contained provisions against transactions intended to defeat or delay creditors or to give one or more of them a preference over any other<sup>8</sup>. The provisions of this Act were embodied in chapter 26 of (1859), Consolidated Statutes of Upper Canada, entitled "An Act respecting the Relief of Insolvent Debtors".

Of considerably more importance was the insolvency legislation of the Parliament of the Province of Canada applicable to Lower Canada; for to it may be traced some of the provisions with respect to "*cession de biens*", or "judicial abandonment" or "assignment" of property under which insolvent estates were administered in Quebec during the period when no Dominion bankruptcy statute was in force. In 1849 an Insolvency Statute was passed entitled "*An Act to Abolish Imprisonment for Debt, and for the Punishment of Fraudulent Debtors in Lower Canada and for Other Purposes*"<sup>1</sup>. The Act applied only to Lower Canada. It provided for the abandonment of his property by an insolvent, and its administration by a curator<sup>2</sup>. All Acts and provisions of law repugnant to or inconsistent with the Act or which made any provision in any matter provided for by the Act other

<sup>6</sup> Sections 2, 3, 9.

<sup>7</sup> Section 12.

<sup>8</sup> Sections 18 19.

<sup>1</sup> (1849), 12 Vic. c. 42.

<sup>2</sup> Sections 4-8.



Chapter II. than such as was made by the Act, were repealed<sup>3</sup>. The provisions of this Act with respect to the abandonment of his property by an insolvent, and its administration by a curator, were later embodied in chapter 87 of (1861), *The Consolidated Statutes of Lower Canada*<sup>4</sup>.

When the monumental work of revision and codification of the laws of Quebec was undertaken in 1857<sup>5</sup>, the Commissioners might have embodied these provisions in the Civil Code. They had before them the French Civil Code, Articles 1265-1270 of which had to do with assignment of property. These articles are to be found in Book III., Title Third, chapter V. "of the Extinction of Obligations"<sup>6</sup>, and are the counterpart of English insolvency legislation<sup>7</sup>. The Commissioners, however, in drawing up the Civil Code, prepared no articles on *cession de biens*<sup>8</sup>, this subject being re-

<sup>3</sup> Section 17.

<sup>4</sup> "An Act respecting arrest and imprisonment for debt, and the Relief of Insolvent Debtors."

<sup>5</sup> Under (1857), 20 Vic. c. 43, Consolidated Statutes of Lower Canada (1861), c. 2, the Commissioners were required to prepare two codes, the Civil Code, and the Code of Civil Procedure. The Codes were to be framed on the same general plan and were to contain the like amount of detail as the French Code Civil, Code de Commerce, and Code de Procedure Civile. Sections 4, 5, 7.

<sup>6</sup> "A *cession de biens* under the French Civil Code is an assignment or abandonment of all his property in favor of his creditors made by a debtor who finds himself unable to pay his debts" (Art. 1265). Such an assignment may be voluntary or judicial. A voluntary assignment is one which creditors accept voluntarily, and the effects of which depend on the contract between the parties. (Art. 1267). A judicial assignment is an advantage which the law grants to a debtor who has been unfortunate and has acted in good faith. He is allowed to make in court to his creditors an abandonment of all his property for the purpose of securing the liberty of his person. (Art. 1268. The law of 22 July, 1867, abolished execution against the person in commercial and civil matters and against foreigners). A judicial assignment confers no ownership on the creditors. It only gives them the right to have the property sold for their benefit and to collect the income in the interim. While it releases the execution against the person of the debtor, it only releases the debtor from his liabilities to the extent of the value of the property abandoned. In case such property is insufficient to discharge his liabilities and the debtor acquires more property he is obliged to abandon it until full payment has been made. (Arts. 1269, 1270).

<sup>7</sup> French bankruptcy law is to be found in the Code de Commerce.

<sup>8</sup> They say at p. 26 of their first report: "No articles have been prepared on the subject of the *cession de biens*. The treatment of that subject in the French code as a payment and means of extinguishing obligations is considered by some of the commentators to be an error. Pothier has not included it in his work on obligations and there is



served for treatment in the Code of Civil Procedure. Chapter II. The Code of Civil Procedure was issued in 1866. Articles 763-780, which deal with *l'abandon ou cession de biens*, are to be found in Book I., Title III., Chapter II. "of compulsory execution of judgments", being section 6 of that chapter. Section 7 of the same chapter is entitled "of coercive imprisonment". Certain of the articles were taken from chapter 87 of the Consolidated Statutes of 1861<sup>9</sup>, others from the French Civil Code.

The articles of section 6 have been considerably altered since they were first issued<sup>10</sup>. When first published they provided that a debtor arrested under a writ of *capias ad satisfaciendum* might make a judicial abandonment of his property for the benefit of his creditors<sup>1</sup>. They also provided for the appointment of a curator, and for the discharge from prison of the debtor<sup>2</sup>. The abandonment of his property did not deprive the debtor of the enjoyment thereof prior to its sale under execution, nor did it discharge him from his obligations beyond the extent to which his creditors were paid<sup>3</sup>. Article 780 read: "Other special provisions concerning insolvent traders are contained in the statute intituled: *The Insolvent Act of 1864*".

### (c) *Rupert's Land and the North Western Territory.*

The territory which at one time was known as Rupert's Land and the North Western Territory, out of which have been created the Provinces of Manitoba, Alberta and Saskatchewan, was comprised in the land granted in 1670 to the Hudson's Bay Company. That company's settlers carried with them such of the laws

nothing in our law which would justify its introduction in this title. The completion of an insolvency law based upon the *Cessio bonorum* of the civil law and so framed as to meet the evident wants of the country, ought to be a matter of consideration, but it does not properly belong to the section of the work now submitted."

<sup>9</sup> See p. XXII., 10th Report of the Commissioners, dated Ottawa, June 21, 1866.

<sup>10</sup> See now Code of Civil Procedure, 1897, Arts. 853-892, issued under (1897). 60 Vic. c. 48.

<sup>1</sup> Art. 763.

<sup>2</sup> Arts. 768, 777.

<sup>3</sup> Arts. 778, 779.



Chapter II. of England as were applicable to the circumstances of their settlement<sup>4</sup>, but the company's charter contained the power to make laws and administer justice. In the District of Assiniboia which extended from the vicinity of Fort Garry to the Rocky Mountains, the company set up a governor and council, who in 1851 passed an ordinance providing that in place of the laws of England as they were in 1670 these laws as they had become at the date of the accession of Queen Victoria, should regulate the proceedings of the Court. In 1864 by another ordinance there was again substituted "all such laws of England of subsequent date as may be applicable." It is possible that the effect of this ordinance taken together with subsequent Imperial, Dominion and Provincial statutes, was to make all existing English law, except so far as inapplicable, extend to the Provinces of Manitoba, Alberta and Saskatchewan<sup>5</sup>.

However that may be, in 1874, that is three years after the entry of Manitoba into Confederation, the Legislature of that province, by 38 Vic. c. 12, s. 1, provided for the introduction in all matters of controversy relative to property and civil rights of the English law as it existed on the 15th July, 1870, so far as the same could be made applicable to matters relating to property and civil rights in the province. This being a provincial statute passed in pursuance of the powers given by section 92 of the B. N. A. Act, could not introduce any of the English Bankruptcy or Insolvency statutes into Manitoba, though it has been held that *The English Debtors Act* of 1869, was thereby introduced<sup>6</sup>.

<sup>4</sup> *Walker v. Walker* (1919), A. C. 947, 951.

<sup>5</sup> See *Walker v. Walker* (1919), A. C. 947, 953; 28 M. L. R. 495. *Sinclair v. Mulligan* (1888), 5 M. L. R. 17, had been to the effect that English law as it existed in 1670 had remained in force in Manitoba. This case is commented on in *Walker v. Walker*, 28 M. L. R. 495. Compare *Fraser v. Kirkpatrick* (1907), 6 Terr. L. R. 403; *Canadian Bank of Commerce v. Adamson* (1883), 1 M. L. R. 3; *Re Tait* (1890), 9 M. L. R. 617; *Re Calder* (1848), (1891), 2 W. L. T. 1; and contrast an article in 4 C. L. T. p. 1; and *Connolly v. Woolrich*, 11 L. C. J. 197.

<sup>6</sup> *Monkman v. Sinnott* (1884), 3 M. L. R. 170; *Re an Attorney* (1886), 3 M. L. R. 316; *Re Bremner* (1889), 6 M. L. R. 73.



In 1888 the Dominion passed an Act<sup>7</sup> for the removal of doubts declaring that "the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 15th day of July, 1870, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada". This Act introduced into Manitoba *The English Matrimonial Causes Act* (1857), 20 & 21 Vic. c. 85<sup>8</sup>.

In 1886 the Dominion Parliament by section 3 of 49 Vic. c. 25, introduced into the North-West Territories "the laws of England relating to civil and criminal matters, as the same existed on the 15th July, 1870 . . . . . in so far as the same are applicable in the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor-in-Council". It has been held under this section that while statutes of a purely local nature were not introduced<sup>9</sup> *The English Matrimonial Causes Act* (1857), 20 & 21 Vic. c. 85 (Imp.) being substantive law was introduced into Alberta<sup>10</sup>, and that a portion of *The English Debtors Act* of 1869<sup>1</sup> is in force in the Territories<sup>2</sup>. Applicable it has been said means "suitable" or "properly adapted to the conditions of the country"<sup>3</sup>.

<sup>7</sup> 51 Vic. c. 33.

<sup>8</sup> *Walker v. Walker* (1919), A. C. 947; 28 M. L. R. 495.

<sup>9</sup> *Le Syndicat Lyonnais du Klondyke v. McGrade* (1906), 36 S. C. R. 25.

<sup>10</sup> *Board v. Board* (1919), A. C. 956.

<sup>1</sup> 32 & 33 Vic. c. 62 (Imp.).

<sup>2</sup> *Fraser v. Kirkpatrick* (1907), 6 Terr. L. R. 403. Sifton, C.J., dissented on the ground that *The Debtors' Act* and *The Bankruptcy Act* refer to each other and are intended to be worked correlatively, and that as *The Bankruptcy Act* was not brought into force under the general provision as to the laws of England in 1870 *The Debtors' Act* was not in force in the Territories.

<sup>3</sup> *Brand v. Griffin* (1908), 1 A. L. R. 510.



Chapter II.*(d) Vancouver Island and British Columbia.*

The colony of Vancouver Island, and the mainland colony of British Columbia, were colonies by settlement.

By proclamation of the 19th of November, 1858, Sir James Douglas, Governor of the mainland colony of British Columbia, ordained that the "civil and criminal laws of England as the same existed at the date of the said proclamation, and so far as they are not from local circumstances inapplicable to the colony of British Columbia, are and will remain in force within the said colony". It appears to have been assumed in British Columbia that this proclamation had introduced the English Bankruptcy and Insolvency laws; for in 1865 by an ordinance to amend the law relating to Bankruptcy and Insolvency, it was declared that the laws of Bankruptcy and Insolvency then existing in the colony should continue in force subject to the provisions of the ordinance. In 1871 an Act was passed to exempt in certain cases cattle from the operation of any Bankruptcy or Insolvency laws.

In 1862 the Assembly of Vancouver Island for the purpose of removing alleged doubts as to the application of the English Bankruptcy and Insolvent laws, passed an Act declaring that the laws of Bankruptcy and Insolvency in England should, subject to the provisions of the Act, be deemed to be the laws of Bankruptcy and Insolvency within the colony.

In 1866 by 29 & 30 Vic. c. 67 (Imp.) the colony of Vancouver Island was united with the colony of British Columbia. Section 5 of that Act provided that, notwithstanding the union, the laws in force in the separate colonies should, until otherwise provided by lawful authority, remain in force as if the Act had not been passed. But by *The English Law Ordinance* of 1867, it was enacted that the "civil and criminal laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia". By Order-in-Council of May 16th, 1871, the colony of Brit-



ish Columbia was admitted into the Dominion of Canada as the Province of British Columbia. The decision of the Judicial Committee of the Privy Council in *Watts v. Watts*<sup>4</sup>, is to the effect that by virtue of the various ordinances and statutes above referred to *The English Divorce and Matrimonial Causes Act* of 1857, 20 & 21 Vic. c. 85, is in force in British Columbia, not being a local Act incapable of application to British Columbia.

<sup>4</sup> (1908), A. C. 573.



## CHAPTER III.

HISTORY OF BANKRUPTCY AND INSOLVENCY LEGISLATION  
IN CANADA SUBSEQUENT TO CONFEDERATION.Chapter III.

Confederation of the Provinces of Canada, Nova Scotia and New Brunswick was accomplished by the *British North America Act* (1867), 30-31 Vic. c. 3. As has been already pointed out<sup>1</sup> the Dominion Parliament was by section 91(21) of *The British North America Act*, given exclusive legislative jurisdiction over the subject matter of Bankruptcy and Insolvency.

The first Act of the Dominion Parliament on this subject was (1869), 32-33 Vic. c. 16, an Act respecting Insolvency. That Act recited that it was expedient that the Acts respecting Bankruptcy and Insolvency in the several Provinces of Ontario, Quebec, New Brunswick and Nova Scotia be amended and consolidated, and the law on those subjects assimilated in the several Provinces of the Dominion. After providing a fairly complete Bankruptcy Code it repealed *The Canadian Insolvent Act* of 1864, and its amending Act of 29 Vic. c. 18, and "all other Acts and parts of Acts now in force in any of the said Provinces which are inconsistent with the provisions hereof"<sup>2</sup>. The scheme of the Act of 1869 was similar to that of 1864. It provided not only for voluntary assignments and compulsory liquidation, but also for the execution of deeds of composition and discharge. It also provided that a debtor might be released from imprisonment on proof that he had made an assignment of all his property and had not been guilty of any fraudulent disposal, concealment or retention of his estate<sup>3</sup>. The Act applied to traders only<sup>4</sup>.

In 1870 by Imperial Order-in-Council, dated 23rd

<sup>1</sup> Chapter I.

<sup>2</sup> Section 154.

<sup>3</sup> Section 145.

<sup>4</sup> Section 1.



June, 1870, Rupert's Land and the North Western Territory were admitted to the Union as from the 15th July, 1870, and thereupon by the effect of (1870), 33 Vic. c. 3 (Dom.) the Province of Manitoba was established and became part of the Union. By (1871), 34 Vic. c. 13 (Dom.), it was declared that the Act of 1869 respecting Insolvency should not apply to insolvents resident in Manitoba, except in the case of Composition and Discharge mentioned in sections 94 to 108 of that Act. Chapter III.

In 1871 by Imperial Order-in-Council, dated 16th May, 1871, the Province of British Columbia was admitted into the Union as from the 20th July, 1871, and finally by Imperial Order-in-Council, dated 26th June, 1873, the Province of Prince Edward Island was admitted into the Union, as from July 1st, 1873.

*The Act respecting Insolvency* (1869), 32-33 Vic. c. 16, was amended by (1870), 33 Vic. c. 38, and by (1871), 34 Vic. c. 25. It was continued in force until 1874 by (1873), 36 Vic. c. 42. By (1874), 37 Vic. c. 46, and (1875), 38 Vic. c. 2, it was again continued in force until 1876; and the Act of (1868), 31 Vic. c. 15, passed by the Assembly of Prince Edward Island, together with the Acts amending and continuing the same, were revived and continued in that Province until the same date.

In 1875 a new Act, 38 Vic. c. 16, *The Insolvent Act* of 1875, was passed. It applied not only to traders and trading co-partnerships, but also to trading companies whether incorporated or not, except incorporated banks, insurance, railway and telegraph companies. It applied to all the provinces<sup>5</sup>. In the main it followed its predecessors, the Acts of 1864 and 1869, but the voluntary assignments sections of the Act of 1869 were dropped. Under the Act of 1875, if a debtor ceased to meet his liabilities generally as they became due a creditor might make a demand on him requiring him to make an assignment<sup>6</sup>. If the debtor made an

<sup>5</sup> Section 150.

<sup>6</sup> Section 4.



Chapter III. assignment, his estate was administered thereunder<sup>7</sup>. Creditors, however, had the alternative remedy of applying to the court for a writ of attachment under which the property of the debtor was seized<sup>8</sup>. The Act also provided for the execution of deeds of Composition and Discharge<sup>9</sup>. Under these provisions the debtor might obtain his discharge on obtaining the consent to a deed of discharge or of composition and discharge of a majority in number of creditors who had proved claims of one hundred dollars and upwards, and who represented three-fourths in value of all claims of one hundred dollars and upwards<sup>10</sup>. If after a year from the date of an assignment or of the issuing of a writ of attachment the debtor had not obtained the consent of the creditors to his discharge or to the execution of a deed of composition and discharge, he might apply to the court for his discharge<sup>1</sup>.

This Act of 1875 repealed<sup>2</sup> *The Canadian Insolvent Act* of 1864, and *Amending Act*, 29 Vic. c. 18 (Can.); *The Insolvent Act* of 1869 (Dom.), and (1870), 33 Vic. c. 38; (1871), 34 Vic. c. 25; (1874), 37 Vic. c. 46; the Prince Edward Statute (1868), 31 Vic. c. 15, and the several amending and continuing Acts; the Vancouver Island Statute of 1862, and the British Columbia Statute of 1865, together with all Acts of the legislatures of Vancouver Island and British Columbia amending the same. It also provided<sup>3</sup> that all other Acts and parts of Acts then in force in any of the provinces inconsistent with the provisions of the Act should be repealed.

The *Insolvent Act* of 1875 was amended by (1876), 39 Vic. c. 30, and (1877), 40 Vic. c. 41. But the system was not found to have worked satisfactorily; there was dissatisfaction with the method of administration, and the constant irritation caused by ill-considered legislative tinkering with so important a piece of legislation

<sup>7</sup> Section 14.

<sup>8</sup> Sections 9, 12.

<sup>9</sup> Sections 49-61.

<sup>10</sup> Section 52.

<sup>1</sup> Section 64.

<sup>2</sup> Section 149.

<sup>3</sup> Section 149.



brought to a head the movement for the repeal of the Act. Chapter I. of (1880), 43 Vic., repealed *The Insolvent Act* of 1875 and the Acts amending it, and provided that no Act repealed by the said Acts or either of them should be revived. By (1881), 44 Vic. c. 27, section 58 of *The Insolvent Act of 1875*, which had been repealed by (1877), 40 Vic. c. 41, s. 14, and which provided that the judge might refuse to discharge the insolvent where the dividend was less than thirty-three per cent., was revived. Chapter III.

Except for winding-up legislation, this was the last Dominion Act on the subject of Bankruptcy and Insolvency until the present *Bankruptcy Act* was passed.



## CHAPTER IV.

BANKRUPTCY AND INSOLVENCY LEGISLATION UNDER THE  
CANADIAN FEDERAL SYSTEM.

Chapter IV. On the abandonment by the Dominion Parliament of its legislative function on the subject of Bankruptcy and Insolvency<sup>1</sup>, the Provincial legislatures were compelled in the interest of commercial discipline to exercise their much less extensive powers, and to endeavour to bring about results somewhat similar to those which might have been accomplished under a comprehensive insolvency law.

Quebec was fortunate in possessing articles 763-780 of the Code of Civil Procedure, which provided a system of administration for the estates of insolvent persons. Amendments were from time to time made to these articles<sup>2</sup>. As revised and amended they now appear as Articles 853-892 of the Code of Civil Procedure of 1897.

The Common Law Provinces started without this advantage; but in time a fairly complete code was built up. It embraced not only provisions against fraudulent preferences, that is to say, preference of one or more creditors at the expense of others; and against fraudulent conveyances, or alienations of land to the prejudice of creditors<sup>3</sup>; but also various enact-

<sup>1</sup> In *Dupont v. La Cie de Moulin* (1888), 11 Lr. N. 225, Mr. Justice Wurtelle said: "It is in the interest of the trade and commerce of the whole Dominion that there should be one uniform law for all the provinces, regulating proceedings in the case of insolvent debtors, unrestricted in its operation by provincial boundaries; that it should be possible to obtain a national execution, and not merely a limited provincial one against the estate of an insolvent debtor who might hold property in several provinces, or transfer it from his own province into another."

<sup>2</sup> See e.g. 1885, c. 22; 1889, c. 51. As to constitutionality see *Parent v. Trudel* (1887), 13 Q. L. R. 136.

<sup>3</sup> The constitutionality of such provincial enactments has been upheld in Manitoba, *Bleasdel v. Townsend* (1883), 3 C. L. T. 509; *Stephens v. McArthur* (1890), 6 M. L. R. 496. In the Supreme Court of Canada the judges with the exception of Patterson, J., avoided expressing any opinion on this matter: 19 S. C. R. 446. See generally,



ments designed to ensure publicity in connection with Chapter IV.  
 transactions which might otherwise be manipulated to the prejudice of the mass of the creditors, or to the secret advantage of the debtor\*. It sought to prevent priority amongst execution creditors<sup>5</sup>; and it provided for the administration of the estates of persons who made assignments for the benefit of their creditors. The legislation in question avoided making any claim to being insolvency legislation, but its chief, if not its only, function was to provide a comprehensive system for the conservation of the property and for the administration of the estate of insolvent persons<sup>6</sup>.

The principal questions, namely, priority among execution creditors, fraudulent preferences, fraudulent conveyances and administration, were first dealt with in Ontario. In 1880 *The Creditors Relief Act* was passed<sup>7</sup>. This was followed in 1885 by an *Act respecting Assignments for the Benefit of Creditors*<sup>8</sup>.

This Act provided for a system of voluntary assignments, and re-enacted<sup>9</sup> in somewhat altered form the provisions of an Act of the late Province of Canada with respect to transactions made with intent to defeat, delay or prejudice creditors, or to give one or more of them a preference<sup>10</sup>. It gave the assignee the exclusive right of suing for the rescission of agreements made in fraud of creditors<sup>1</sup>. Section 9 of the

cases cited in *Re Assignments and Preferences Act* (1893), 20 O. A. R. 489, and *Tooke Bros., Ltd. v. Brock & Patterson, Ltd.* (1907) 3 E. L. R. 270, 272.

\* See the various Acts respecting Bills of Sale and Chattel Mortgage, Conditional Sale of Chattels, and Bulk Sales. See as to the constitutionality of a *Provincial Bills of Sale Act*, *In re and ex parte Deveber* (1882), 21 N. B. R. 397; *In re Deveber ex parte Bank of New Brunswick* (1882), 21 N. B. R. 401.

<sup>5</sup> See *The Creditors' Relief Acts* which followed (1880), 43 Vict. c. 10 (Ont.).

<sup>6</sup> The necessity for example of a provision against fraudulent preferences exists only when the estate of the debtor is insufficient to satisfy the claims of all his creditors.

<sup>7</sup> (1880), 43 Vic. c. 10 (Ont.).

<sup>8</sup> (1885), 48 Vic. c. 26. The example of Ontario in passing an Assignments Act was followed in the other provinces. See (1885), Man. c. 45; (1888), N. W. T. No. 49; (1890), B. C. c. 12; (1895), N. B. c. 6; (1898), N. S. c. 11; (1898), P. E. I. c. 4; (1906), Sask. c. 25; (1907), Alta. c. 6.

<sup>9</sup> Section 2.

<sup>10</sup> Consol. Stat. (1859), 22 Vic. c. 26, ss. 17, 18.

<sup>1</sup> Section 7.



**Chapter IV.** Act provided that an assignment for the benefit of creditors under the Act should take precedence of all judgments and of all executions not completely executed by payment. The Act contained no provision for the discharge of the debtor from his liabilities.

The provisions of section 9 of the Act<sup>2</sup> were attacked in the *Voluntary Assignments Case*<sup>3</sup> as beyond the competence of the Provincial legislature.

The judgment of the Judicial Committee upheld the validity of this section<sup>4</sup>. The judgment reads in part:

“Their lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions, and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the provincial parliament. . . .

“But it is argued that, inasmuch as this assignment contemplates the insolvency of the debtor and would only be made if he were insolvent, such a provision purports to deal with insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency or any legislation relating thereto. . . .

“It is not necessary in their lordships’ opinion, nor would it be expedient to attempt to define, what is covered by the words ‘bankruptcy’ and ‘insolvency’ in section 91 of the B.N.A. Act. But it would seem

<sup>2</sup> As re-enacted in (1887), R. S. O. c. 124.

<sup>3</sup> *Atty.-Gen. (Ont.) v. Atty.-Gen. (Can.)* (1894), A. C. 189; 63 L. J. P. C. 59.

<sup>4</sup> It was on this judgment that the right to pass the voluntary assignment codes was based. See *Tooke Bros., Ltd. v. Brock & Patterson, Ltd.* (1907), 3 E. L. R. 270, 272.



that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be ratably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent's estate. Chapter IV.

“In their lordships’ opinion, these considerations must be borne in mind when interpreting the words ‘bankruptcy’ and ‘insolvency’ in *The British North America Act*. It appears to their lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion parliament in existence.”



Chapter IV. The ancillary doctrine enunciated in the *Voluntary Assignments Case* is of considerable importance. It enables the Dominion to pass complete and full-rounded legislation. Dominion provisions which are truly ancillary<sup>5</sup> or, as the latest phrase is, necessarily incidental<sup>6</sup> to a general bankruptcy or insolvency law, may effect a virtual repeal of provincial legislation. There can be no direct repeal; but if the two are in conflict the Dominion enactment must prevail<sup>7</sup>.

The extent of the Dominion power may be further determined by reference to the earlier case of *Cushing v. Dupuy*<sup>8</sup>. The question there was whether the Dominion might limit appeals in insolvency. The argument was that such legislation would be an interference not only with property and civil rights, but also with procedure in civil matters, which classes of subjects are by section 92(13)(14) of the B. N. A. Act, exclusively assigned to the legislature of the Province. The Judicial Committee said<sup>9</sup>:

"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary

<sup>5</sup> *Grand Trunk Ry. Co. v. Atty.-Gen. of Canada* (1907), A. C. 65, 68.

<sup>6</sup> *Montreal v. Montreal Street Railway* (1912), A. C. 333, 344. In adopting a more stringent test than that suggested by Anglin, J.—"reasonably necessary"—the Judicial Committee appear to have produced a new doctrine, that of "co-operation" between the Dominion and the Provinces (1912), A. C. 333, 345-6; *cf. per* Anglin, J., in (1910), 43 S. C. R. 197, 241, 246. See generally on ancillary legislation: Clement, 3rd ed., 1916, pp. 497-505; Lefroy, *Canadian Federal System*, Chapter 17.

<sup>7</sup> *Attorney-General (Ont.) v. Attorney-General (Dom.)* (1896), A. C. 348, 366, 369; *La Compagnie Hydraulique de St. Francois v. Continental Heat and Light Co.* (1909), A. C. 194, 198; *In re Kilam* (1874), 14 C. L. J. N. S. 242; *Tennant v. Union Bank of Canada* (1894), A. C. 31; *Crown Grain Co. v. Day* (1908), A. C. 504, 507; *Kinney v. Dudman* (1876), 11 N. S. R. (2 Russ. & Ches.) 19.

<sup>8</sup> (1880), 5 A. C. 409.

<sup>9</sup> At p. 415.



implication, that the Imperial Statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law<sup>1</sup> relating to those subjects might affect them. Their lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial legislature by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to appeal as of right to Her Majesty in Council as allowed by Art. 1178 of the Code of Civil Procedure''<sup>2</sup>.

*The Bankruptcy Act*, 1919, is applicable not only to individuals and partnerships but also to certain classes of companies. In this respect it follows the *Insolvent Act* of (1875) and the present United States statute<sup>3</sup>. *The Winding-Up Act*, which did not provide for a discharge from contracts, provided for the distribution of the assets of insolvent companies, and so was valid insolvency legislation<sup>4</sup>. The Dominion Parliament may not only pass a general law for the winding-up of companies, but it has also power to pass a special act to incorporate the assignees of an insolvent bank and

<sup>1</sup> See *L'Union St. Jacques de Montreal v. Belisle* (1874), L. R. 6 P. C. 31, at 36, as interpreted by *Quirt v. The Queen* (1891), 19 S. C. R. 510; *sub nom. R. v. County of Wellington*, 17 O. A. R. 421; 17 O. R. 615.

<sup>2</sup> See also *Tennant v. Union Bank of Canada* (1894), A. C. 31; *Shields v. Peak* (1882), 8 S. C. R. 579; 6 O. A. R. 639; 31 U. C. C. P. 112. See previously on the question of interference with section 92(14) of the B. N. A. Act, *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575, 580.

<sup>3</sup> (1875) 38 Vic. c. 16, s. 1 (Dom.); (1898), *U. S. Bankruptcy Act*, s. 4. This system has the advantage of avoiding two bankruptcy codes. The procedure under the *Bankruptcy Act* is less complicated than that under the *Winding Up Act*, and the system of administration better, though amendments are required to make the *Bankruptcy Act* more nearly fit all cases which may arise in the winding up of companies.

<sup>4</sup> *Per Patterson, J. In Shoolbred v. Clarke in re Union Fire Insurance Co.* (1890), 17 S. C. R. 265, 274; *Dupont v. La Cie de Moulin* (1888), 11 L. N. 225; *In re the Eldorado Union Store Co.* (1886), 18 N. S. R. (6 R. & G.) 514; *In Harrison v. Nepisiquit Lumber Co., Ltd.* (1911), 11 E. L. R. 314, it was held that while insolvency is one ground upon which a company may be wound up under the *Winding Up Act* this does not make the *Winding Up Act* an "Act relating to Insolvency" within the meaning of the *New Brunswick Bills of Sale Act*. The application of the discharge sections of the *Bankruptcy Act* to the case of companies appears to have been due to an oversight.



Chapter IV. give them authority to carry on the business of the bank as far as it is necessary for the winding-up of the same<sup>5</sup>. On the other hand, provided the Act is not winding-up legislation, a province may, as a matter merely of a local or private nature within section 92 (16) of the B. N. A. Act, pass an Act for the relief of a particular association which is in a state of extreme financial embarrassment<sup>6</sup>. It has also been held that in the absence of Dominion legislation, a Provincial legislature may as a matter of civil procedure, pass an Act with respect to the sequestration of the property of a provincially incorporated insolvent railway company which has been declared to be a work for the general advantage of Canada<sup>7</sup>.

While a Dominion Winding-Up Act cannot be invoked for the purpose of the original winding-up of the entire business of a foreign company which is doing business in Canada, it is applicable to insolvent foreign companies doing business in Canada, and may, as ancillary to winding-up proceedings in the foreign court, be invoked to wind up the business being conducted in Canada<sup>8</sup>. Such legislation is *intra vires* the Dominion parliament<sup>9</sup>.

While the provisions of the Dominion Act with respect to the winding-up of insolvent provincially incorporated companies are *intra vires*<sup>10</sup> it has been suggested that the Dominion parliament would be incompetent to declare that the *Dominion Winding-Up Act* should apply to provincial companies whether

<sup>5</sup> *Quirt v. The Queen* (1891), 19 S. C. R. 510; *sub nom. R. v. County of Wellington*, 17 O. A. R. 421; 17 O. R. 615.

<sup>6</sup> *L'Union St. Jacques de Montreal v. Belisle* (1874), L. R. 6 P. C. 31; as explained in *Quirt v. The Queen* (1891), 19 S. C. R. 510; *sub nom. R. v. County of Wellington*, 17 O. A. R. 421; 17 O. R. 615.

<sup>7</sup> *Per Baby, Bosse, Blanchet, (Hall & Wurtele, diss.) in Nantel v. La Compagnie de Chemin de Fer de la Baie des Chaleurs* (1896), Q. R. 5 Q. B. 64; Q. R. 6 S. C. 47, affirming Pagnuelo, J.

<sup>8</sup> *Allen v. Hanson, In re The Scottish Canadian Asbestos Co., Ltd.* (1890), 18 S. C. R. 667; explaining *Merchant's Bank of Halifax v. Gillespie* (1885), 10 S. C. R. 312; and see *Re Briton Medical and General Life Association, Ltd.* (1886), 12 O. R. 441, 447.

<sup>9</sup> *Allen v. Hanson In re The Scottish Canadian Asbestos Co., Ltd., supra.*

<sup>10</sup> *Shoolbred v. Clarke In re Union Fire Insurance Co.* (1890), 17 S. C. R. 265; *Re The Eldorado Union Store Co.* (1886), 18 N. S. R. (6 R. & G.) 514.



insolvent or not<sup>1</sup>. The question is hardly likely to arise in exactly that way under *The Bankruptcy Act*. The assignment, composition and extension provisions of *The Bankruptcy Act* speak of insolvent debtors only. Insolvent is defined in section 2(*t*). A receiving order moreover may only be made on proof of an act of bankruptcy, and of the existence of a debt of five hundred dollars or upward<sup>2</sup>.

In the interpretation of a federal Act, it is at times important to determine the legal principles which should apply<sup>3</sup>. The applicable principle in the provinces in which the principles of English bankruptcy law are not in force<sup>4</sup> has yet to be determined.

In some respects *The Bankruptcy Act* is superimposed on provincial law. Thus, where no provision is made in *The Bankruptcy Act* for such matters, reference must be made to provincial laws to determine such questions as what constitutes the property of the debtor, who are creditors, and who are secured creditors<sup>5</sup>.

The questions of the extra-territorial operation of a Dominion statute and of the effect under a Dominion

<sup>1</sup> Per *Maybe: J.*, in *re Cramp Steel Co., Ltd.* (1908), 16 O. L. R. 230. See as to the different decisions in the different provinces on the applicability of the *Dominion Winding Up Act* to provincially incorporated companies which are not shown to be insolvent: *Re Empire Timber, Lumber & Tie Co., Ltd.* (1920), 48 O. L. R. 193; 19 O. W. N. 29; *In re Colonial Investment Co. of Winnipeg* (1913), 23 M. L. R. 871; 15 D. L. R. 634; *In re The Lake Winnipeg Transportation Lumber and Trading Co.* (1891), 7 M. L. R. 255; *In re The Eldorado Union Store Co.* (1886), 18 N. S. R. (6 R. & G.) 514. See for the possible meaning of the phrase "Bankruptcy and Insolvency": *L'Union St. Jacques v. Belisle* (1874). L. R. 6 P. C. 31, 36 quoted in Chap. I.

<sup>2</sup> Sections 9, 13 and 4: *In re Cramp Steel Co., Ltd.* (1908), 16 O. L. R. 230, it was held that the then *Dominion Winding Up Act*, R. S. C. (1906), c. 144, did not apply to a provincially incorporated company which had no creditors, and which was not insolvent: Contrast *Re Hamilton Ideal Mfg. Co., Ltd.* (1915), 34 O. L. R. 66.

<sup>3</sup> Cf. *Atty.-Gen. (Ont.) v. Atty.-Gen. (Dom.)* (1910), A. C. 637, 645. As to whether there is a common law of the Dominion, *quære*. If there is no common law of the Dominion *The Bankruptcy Act* is not a codifying statute, as is the English Act. As to codifying statutes, see *Bank of England v. Vagliano Bros.* (1891), A. C. 107; *Robinson v. C. P. R. Co.* (1892), A. C. 481, 487; *Despatie v. Tremblay* (1921), 37 T. L. R. 395, 396.

<sup>4</sup> See Chapters II. and III.

<sup>5</sup> See notes to sections 2(*dd*), and 52. See also Chapter VI. and *Cushing v. Dupuy* (1880), 5 A. C. 409; and compare on *The Bills of Exchange Act*, *Cook v. Dodds* (1903), 6 O. L. R. 608.



Chapter IV. statute of transactions which take place outside Canada, belong to the domain of Constitutional Law. They are discussed in the leading text-books<sup>6</sup>.

The scheme of *The Bankruptcy Act* with respect to the creation of Courts of Bankruptcy and the administration of the Act is discussed in the notes to sections 63 *et seq.* Section 87 provides that all persons who are barristers, solicitors or advocates of any court in any province may practice as barristers, solicitors and advocates in the courts exercising bankruptcy jurisdiction under the Act in any or in all the provinces.

Section 122 of the *English Bankruptcy Act*<sup>7</sup> reads:

122. The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Certain other questions respecting Bankruptcy and Insolvency legislation under the Canadian Federal system are discussed in Clement, *Canadian Constitution*, 3rd ed., 1916, Carswell Co., Ltd., pp. 804-814; Lefroy, *Canada's Federal System*, 1913, Carswell Co., Ltd., pp. 279-293.

<sup>6</sup> Clement, *Canadian Constitution*, 3rd edition, 1916, pp. 65-115; Lefroy, *Canada's Federal System*, 1913, pp. 101-106, 185; see also notes to ss. 2(*o*) and 2(*dd*).

<sup>7</sup> (1914), 4 & 5 Geo. V. c. 59 (Imp.).



## CHAPTER V.

## BANKRUPTCY ADMINISTRATION.

A bankruptcy or insolvency law is part of the Chapter V.  
settled jurisprudence of every great commercial country. This was true in the past as it is true to-day in Rome as well as in England, in the United States of America, in France and in Germany. England has not been without a bankruptcy statute since 1542.

Bankruptcy legislation in England<sup>1</sup> under the early statutes was an attempt to repress and punish what were conceived to be deliberately fraudulent persons, that is to say, persons who "craftily obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties"<sup>2</sup>. Bankrupts were

<sup>1</sup> Bankruptcy legislation began in England in 1542 with the statute 34 & 35 Hy. VIII. c. 4; but this was soon followed in 1571 by the more important Act of 13 Eliz. c. 7. In the same year the statute of 13 Eliz. c. 5, an Act against Fraudulent Deeds, Gifts and Alienations, was passed. The principles of bankruptcy law and administration as established by this statute continued in England with few changes until the 19th century. The statute provides a conspicuous example of administration by Commissioners. It was applicable only to traders; and was administered with some severity: Changes were made by 1 Jas. I. c. 15; 21 Jas. 1 c. 19; 4 Anne c. 17; 5 Anne c. 22; 10 Anne c. 15; and 5 Geo. II. c. 30. In 1825 all the existing bankruptcy legislation was repealed by 6 Geo. IV. c. 16 and the law consolidated. Further statutes, namely, 1 & 2 William IV. c. 56, and 5 & 6 Vic. c. 122, followed until in 1849 the first of the modern great Bankruptcy Codes, 12 & 13 Vic. c. 106, was passed. Changes made by the Acts of 1861 and 1868 (24 & 25 Vic. c. 134, and 31 & 32 Vic. c. 104) were followed in 1869 by the second of the great Codes, 32 & 33 Vic. c. 71, along with which was passed the *Debtor's Act* (32 & 33 Vic. c. 62). These two Acts established in the main the modern principles of bankruptcy law, but the administration under the *Bankruptcy Act* was found to be expensive and cumbersome. Accordingly, in 1883, the third and last of the Bankruptcy Codes was passed, namely, 46 & 47 Vic. c. 52. The law of bankruptcy as it exists in England to-day is substantially the same as that contained in the Act of 1883; although some rather important changes were made in 1890 (53 & 54 Vic. c. 71) and 1913 (3 & 4 Geo. V. c. 34). In 1914 the existing law was consolidated by 4 & 5 Geo. V. c. 59.

<sup>2</sup> (1542) 34 & 35 Hy. VIII. c. 4.



Chapter V. accordingly treated as criminals<sup>3</sup>. In time however it came to be considered that while a statute was necessary which should punish actual fraud and provide for the distribution of the assets of insolvents, provision should also be made for the relief of honest but unfortunate traders from that ruin to which they as traders were more subject than the non-commercial classes. Commencing therefore with (1705), 4-5 Ann, c. 4, the *Bankruptcy Acts* made provision for the discharge of the honest but unfortunate insolvent trader from his liabilities. It was only to traders that this privilege was accorded. This distinction between the treatment of traders and non-traders lasted in England until 1861. Due partly to the growing difficulty of defining who were and who were not traders, the distinction was abolished by *The Bankruptcy Act* of 1861, and the privilege of discharge was made available to all persons<sup>4</sup>.

A complete bankruptcy code usually provides for:

1. The initiation of insolvency proceedings.
2. The preservation of the property of the debtor.
3. The machinery for the administration of the estate.
4. The administration of the estate.
5. The punishment of the debtor for acts prejudicial to his creditors or contrary to honest business practice.
6. The discharge of the debtor from his liabilities.

<sup>3</sup> See *per* Fitzgerald, L.J., in *Colonial Bank v. Whinney* (1886), 11 A. C. 426, 442. In the *Spectator*, No. 428, Steel speaks of "that most dreadful of all human conditions, the case of Bankruptcy." In Italy *fallitus ergo fraudator* was at one time accepted as a legal axiom. In France there is a clearly defined distinction between *Faillite* and *Banqueroute*. Under French law there are three kinds of insolvency: *faillite* or simple insolvency, where no element of blame attaches; *banqueroute simple*, or insolvency which contains elements subjecting the debtor to disciplinary action by the court; and *banqueroute frauduleuse*, or insolvency containing criminal features. See Code de Commerce, Book III., Titles I. and II. By the custom of Laval, some centuries ago, a person who had become insolvent was required to wear a green cap as a sign of his folly, *Traite des Faillites*, par Augustin, Charles Renouard. Première Partie Chap. II.

<sup>4</sup> In continental systems the law of bankruptcy applies only to traders. Unless a composition is agreed to there is no discharge in the English sense short of payment in full.



These six matters are all covered by *The Bankruptcy Act* of 1919<sup>5</sup>. It is proposed to discuss the provisions of the Act under the same headings. Chapter V.

1. *The initiation of proceedings.*

*The Bankruptcy Act* provides three methods for the initiation of proceedings with respect to the affairs of an insolvent debtor.

(a) The debtor may make a proposal to his creditors for a composition of his debts, or an extension of time for their payment, or a scheme of arrangement of his affairs<sup>6</sup>. If this proposal is accepted by a sufficient number of the debtor's creditors the Court may confirm it, whereupon it will bind dissentient creditors, and, if carried out, is equivalent to a discharge. *The Bankruptcy Act Amendment Act*, 1921, has extended the composition, extension or scheme provisions of *The Bankruptcy Act*, and contains some novel features, the working out of which will be watched with interest.

(b) The debtor may make what is called an authorized assignment for the benefit of his creditors<sup>7</sup>. This is intended to be the equivalent of the petition in bankruptcy which, under the English Act, the debtor may present. By what appears to be an oversight, the property which is available for distribution to the creditors under an authorized assignment is not so extensive as that under a receiving order<sup>8</sup>.

(c) Where a debtor has committed an act of bankruptcy a creditor, to whom is owing a debt of the required amount, may petition the Court, asking that a receiving order be made for the protection of the estate, and that the debtor be adjudged bankrupt<sup>9</sup>. The effect of the receiving order is to vest in a trustee,

<sup>5</sup> *The Bankruptcy Act* of 1919 is based mainly on the English Act of 1883. Not all of the English amendments of 1890 & 1913 (which appeared in the consolidating Act of 1914) have been included. *The Bankruptcy Act* of 1919 also contains provisions taken from *The Insolvent Act* of 1875, from the *Winding Up Act* of 1906, and from various *Provincial Assignments and Preferences Acts*.

<sup>6</sup> Section 13.

<sup>7</sup> Sections 9, 10.

<sup>8</sup> See *infra*.

<sup>9</sup> Section 4.



Chapter V. as of the date of the presentation of the petition, all the property of the debtor wheresoever situate<sup>10</sup>.

2. *The preservation of the property of the debtor.*

Every comprehensive bankruptcy code must of necessity provide for the preservation of such property as the debtor may have at the initiation of the proceedings, but it must also cover certain transactions entered into before that date.

It is a common practice for debtors who are on the eve of insolvency, or actually insolvent, either to convey their property to other persons for their own ultimate benefit, or to prefer one or more creditors at the expense of the others. English law knows these two transactions under the names of fraudulent conveyances, and fraudulent preferences. *The Bankruptcy Act* makes each of them an act of bankruptcy. It explicitly forbids fraudulent preferences<sup>1</sup>, but it leaves to provincial law the enactment of provisions against fraudulent conveyances<sup>2</sup>. It is also against the considered policy of the bankruptcy law that a man who is insolvent or on the eve of insolvency should be permitted to make certain payments which will directly or indirectly enure to his benefit, such as payments made in pursuance of the debtor's marriage contract<sup>3</sup>.

In addition to the cases just mentioned, there is an infinite variety of transactions injurious to the estate of the debtor into which he may enter after he is insolvent. These either are not covered by the provisions just referred to or they cannot be avoided without the expense of court proceedings. The doctrine of the relation back of the title of the trustee is intended to cover them. The principle on which the English Act proceeds with respect to the relation back of the trustee's title is simple and practical. Once a debtor has committed an "act of bankruptcy", his estate stands subject to be administered in bankruptcy, and, provided proceedings are taken within three months after

<sup>10</sup> Sections 4 and 25.

<sup>1</sup> Section 31.

<sup>2</sup> See notes to section 3(b).

<sup>3</sup> Section 29.



the act of bankruptcy has been committed, the title of the trustee will relate back to the moment of time when the act of bankruptcy was committed. The result is that a debtor who has committed an act of bankruptcy is potentially incompetent to transfer, mortgage or otherwise deal with his property, except to innocent persons. This provision is most efficacious in preventing the wasting of the estate by the debtor after he has committed an act of bankruptcy. Similar provisions exist in the bankruptcy legislation of France, Belgium, Italy, Spain and the Netherlands. In France<sup>4</sup> and Belgium<sup>5</sup> the tribunal either of its own motion or on application of any party interested, fixes the date at which the cessation of payments shall be deemed to have taken place<sup>6</sup>. Under *The Bankruptcy Act* of 1919, the relation back of the title of the trustee is not so extensive as under the English Act. Under our Act relation back is only to the date of the presentation of the petition<sup>7</sup>.

In most bankruptcy systems provision is made for the distribution of property which the debtor may acquire after the date of the assignment or receiving order. This was the practice in Quebec under Art. 873, C.P.C. It is the practice in England, whether the proceedings are voluntary or involuntary. *The Bankruptcy Act*, 1919, however, makes a strange distinction between property passing under an authorized assignment and that passing under a receiving order. In the case of a bankrupt the property vesting in the trustee includes all property which may be acquired by or devolve on the bankrupt before his discharge; but under an authorized assignment the trustee obtains only such property as may belong to or be vested in the debtor at the date of the execution of the authorized assignment<sup>8</sup>.

<sup>4</sup> Code de Commerce Art. 441. See for the effect of a cessation of payments on the debtor's transactions, Arts. 446-450.

<sup>5</sup> Loi du 18 April, 1851, Art. 442.

<sup>6</sup> Bankruptcy, a Study in Comparative Legislation, by S. Whitney Dunscomb, Jr., Columbia College Studies in History, Economics and Public Law, 1893, Vol. II. No. 2, at page 40.

<sup>7</sup> See notes to section 4(10).

<sup>8</sup> Section 25. See for a discussion as to the advisability of making liable the after-acquired property of the debtor: Speech on Bankruptcy



Chapter V.     3. *The machinery for the administration of the estate.*

There are two main systems of administration in bankruptcy or insolvency. The first is that which may be called state administration. It is the system of most European continental countries; and has some advantages<sup>9</sup>.

The alternative system is that of administration by trustees who may be subject to control by the Court, but not by any state department. This system may take various forms. One of the chief weaknesses of the *Insolvent Acts* of 1869 and 1875 was in the administration. While these Acts provided for administration by official assignees, appointments in many cases were made of persons quite unfitted to perform the duties of their office, and as the Court's control is regulative rather than directory, the administration of the Act fell into disrepute. *The Bankruptcy Act* of 1919 provides for administration by authorized trustees, who are appointed by the Governor in Council on application made to the Secretary of State of Canada<sup>10</sup>. This provision will no doubt ensure the appointment only of persons reasonably competent to administer the Act; but, while a certain majority of creditors, or the Court, may remove a trustee from the administration of an estate<sup>1</sup>, there is no provision for any general

and other Commercial subjects by the Rt. Hon. Geo. J. Goschen, M.P., Feb. 7, 1868. London; Effingham Wilson, Royal Exchange. Under German law the property of the debtor distributed among his creditors does not include after-acquired property; and creditors who have proved in the bankruptcy cannot touch the after-acquired property of the bankrupt while the bankruptcy is going on. When the administrator has distributed all the property which the debtor had at the time of the petition the bankruptcy is terminated; but the debtor is only released from his debts to the extent to which those debts have been paid; and the creditors can then proceed exactly as if there had been no bankruptcy. See *per* Dr. E. J. Schuster, Q. 5571, p. 236 of Report of the Committee appointed by the Board of Trade to inquire into the Bankruptcy Law and its Administration. Cd. 4068. 1908 H. M. Stationery office.

<sup>9</sup> See the evidence of M. Gabreil Astoul, counsel to the French Embassy, in Report of the Committee appointed by the Board of Trade to inquire into the Bankruptcy Law and its Administration. Cd. 4068. 1908 H. M. Stationery office, and see Code de Commerce Arts. 451, 462, 491, 587-590, 592.

<sup>10</sup> Section 14.

<sup>1</sup> Section 15.



control of authorized trustees by the Governor in Chapter V.  
Council<sup>2</sup>.

#### 4. *The administration of the estate.*

The general scheme of the Act is that the trustee is to administer the estate in accordance with the wishes of the creditors, under the direction of the inspectors, subject in all things to the provisions of the *Bankruptcy Act*. For this purpose the trustee is given wide statutory powers<sup>3</sup>. The inspectors are appointed at the first or a subsequent meeting of creditors<sup>4</sup>. The permission in writing of the inspectors must be obtained by the trustee before he can do certain things in the administration of the estate<sup>5</sup>. The inspectors are, as it were, the executive body for the creditors. At the first meeting the creditors may give directions to the trustee with reference to the disposal of the estate<sup>6</sup>, but once the inspectors have been appointed, the creditors have little direct say in the administration of the estate<sup>7</sup>, though the trustee is required to call a meeting of creditors whenever requested in writing by twenty-five per cent. in number of the known creditors holding twenty-five per cent. in value of the known claims<sup>8</sup>. The personnel of the inspectors may be changed by the creditors<sup>9</sup>.

As soon as may be after the making of the receiving order or authorized assignment, the trustee should take possession of the deeds, books and documents of

<sup>2</sup> The system under the English Act is a compromise between official and unofficial administration. The Act provides for Official Receivers, who act under the Board of Trade. Pending the appointment of a trustee the Official Receiver is interim receiver of the debtor's estate; he summons and presides at the first meeting of creditors; reports to the creditors any proposal which the debtor may have made with respect to the mode of liquidating his affairs; investigates the conduct of the debtor; and takes part in the public examination of the debtor: (1914), 4 & 5 Geo. V. c. 59, ss. 70-75. After thus as it were, getting the bankruptcy proceedings under way the Official Receiver hands over to a trustee appointed by the creditors (S. C. ss. 18, 19).

<sup>3</sup> Sections 17-21. The general position of the trustee is fully discussed in Chap. VI.

<sup>4</sup> Section 43.

<sup>5</sup> Sections 20-21.

<sup>6</sup> Section 42(1).

<sup>7</sup> See sections 35, 53(1).

<sup>8</sup> Section 42(3).

<sup>9</sup> Section 43(3).



Chapter V. the debtor, and all other parts of his property capable of manual delivery<sup>10</sup>.

\* The trustee is required within five days from the date of the receiving order or assignment to mail circulars calling the first meeting of creditors for a date not later than fifteen days after the mailing of the notice<sup>1</sup>. Forms for proof of debt and proxies<sup>2</sup> should be sent out with the circulars.

The first business at the meeting is the election of a chairman. Only creditors who have lodged proofs of their debts with the trustee before the time appointed for the meeting may vote at the meeting<sup>3</sup>. The chairman has power to admit or reject proofs for the purpose of voting<sup>4</sup>. A creditor may vote in person or by proxy<sup>5</sup>. Secured creditors may only vote in respect of the unsecured portion of their claims<sup>6</sup>. Restricted creditors may neither prove nor vote<sup>7</sup>.

The debtor must be present at the first meeting of creditors and must submit to examination and give such information as the meeting may require<sup>8</sup>. The debtor may be further examined on a resolution passed by creditors or inspectors<sup>9</sup>. At the first meeting the creditors will elect inspectors and give directions to the trustee with reference to the disposal of the estate<sup>10</sup>.

Under the assignment and receiving order sections of the Act, the business of an insolvent debtor may be carried on, but only so far as may be necessary for the beneficial winding-up of the same<sup>1</sup>. Under the composition, extension and scheme provisions, however, the business of a debtor may, it seems, be carried on not merely with a view to its winding-up, but also for the purpose of rehabilitating it<sup>2</sup>.

<sup>10</sup> Section 17(1).

<sup>1</sup> Section 42(2).

<sup>2</sup> Section 42(13).

<sup>3</sup> Section 42(9).

<sup>4</sup> Section 42(12).

<sup>5</sup> Section 42(13).

<sup>6</sup> Sections 42(10) (16), 46.

<sup>7</sup> Notes to section 48.

<sup>8</sup> Section 54.

<sup>9</sup> Section 56.

<sup>10</sup> Section 42(1).

<sup>1</sup> Section 20(1) (b).

<sup>2</sup> Sections 19, 27.



Dividends are distributed only among creditors who have proved their debts<sup>3</sup>. Restricted creditors are not entitled to claim any dividend until all claims of other creditors for money or money's worth have been satisfied<sup>4</sup>. The Act does not disturb the rights of secured creditors under their securities, provided the giving of the security did not constitute a fraudulent preference; but unless a secured creditor either realizes, surrenders or values his security he is excluded from all share in any dividend<sup>5</sup>.

Before payment of dividends the trustee is entitled to retain such sums as are necessary for the costs of administration or otherwise<sup>6</sup>, and the payment in the following order of priority, of certain moneys due to the landlord for rent<sup>7</sup>, the fees and expenses of the trustee, the costs of the execution creditor, and claims for wages for services rendered during three months before the date of the receiving order or assignment<sup>8</sup>.

The first dividend must be paid within six months from the date of the receiving order or authorized assignment or earlier if required by the inspectors<sup>9</sup>. Further dividends are to be paid whenever the trustee has sufficient moneys in hand to pay the creditors ten per cent<sup>10</sup>. The Act provides for the payment of a final dividend and for the payment over to the Receiver-General of all declared but unpaid dividends<sup>1</sup>. It also provides for the discharge of the trustee<sup>2</sup>, but makes no provision for an Official Receiver to represent the estate and reduce to possession property which may fall in after the discharge of the trustee.

*5. The punishment of the debtor for acts prejudicial to his creditors or contrary to honest business practice.*

Part VIII. of the Act deals with Bankruptcy

<sup>3</sup> Section 37.

<sup>4</sup> Section 48.

<sup>5</sup> Section 46, *cf.* 42(10).

<sup>6</sup> Section 37.

<sup>7</sup> Section 52.

<sup>8</sup> Section 51.

<sup>9</sup> Section 37(1).

<sup>10</sup> Section 37(1).

<sup>1</sup> Section 37.

<sup>2</sup> Section 41



Chapter V. offences. There are also provisions in the Criminal Code with respect to similar offences. The provisions of the Code are referred to in the notes to the sections in Part VIII.

6. *The discharge of the debtor from his liabilities.*

Next perhaps to integrity and impartiality in the administration of the estate by trustees, the success or otherwise of any bankruptcy system depends on the administration of the discharge provisions of the Act. Laxity in the administration of this part of the Act has been one of the principal causes of dissatisfaction with United States Bankruptcy statutes, which have too often been administered as if they were a clearing house for the liquidation of debts, a sort of constant Jubilee. The Act itself empowers the Court either to grant or refuse an absolute order of discharge, or to suspend the operation of the order for a specified time, or to grant a conditional order of discharge. The benefit of the discharge provisions is now opened not merely to unfortunate traders, but to all insolvent debtors; but it may be that the Court will administer these provisions in the light of their historical development in English and Canadian law, that is to say, as the conferring of a boon on persons who, without fault of their own, have been overtaken by a great calamity<sup>3</sup>.

A discharge frees the debtor with certain defined exceptions<sup>4</sup> from all debts which were provable in his bankruptcy or under authorized assignment proceedings<sup>5</sup>. The idea is that if a debtor is entitled to his discharge he is to be a free man in the widest possible sense, freed that is to say not only from past and present, but also from future and contingent claims. This is not a modern conception, but the machinery necessary to the effective carrying out of the conception is modern<sup>6</sup>.

<sup>3</sup> Under the French law even a *faillite*, as distinguished from a *banqueroutier*, realizes that to come under the insolvency law is not a pleasant matter. See Code de Commerce Art. 455ff.

<sup>4</sup> Section 61.

<sup>5</sup> Section 61.

<sup>6</sup> See notes to sections 44, 49, 50.



## CHAPTER VI.

## POSITION OF THE TRUSTEE UNDER THE BANKRUPTCY ACT.

Under *The Bankruptcy Act* the trustee occupies a Chapter VI.  
 three-fold position. He represents the debtor in the sense that he steps into his shoes, and takes the debtor's property subject to all the equities under which the debtor held it. But the trustee also occupies a higher position than the debtor by virtue of certain provisions of *The Bankruptcy Act*. Thirdly, the trustee may avoid certain transactions of the debtor which are not mentioned in *The Bankruptcy Act*. Such transactions are those which are against the policy of the bankruptcy law, or contrary to statutes passed in the general interest of creditors<sup>1</sup>.

Generally speaking the trustee, whether he is acting under a receiving order, an authorized assignment or a composition, extension or scheme, steps into the shoes of the debtor. He has all his rights but occupies no better position than the debtor<sup>2</sup>, and a liquidator is in the same position<sup>3</sup>. A trustee therefore acquires the interest of the debtor in his property subject to the rights of third parties, such as lienholders whose liens have already attached<sup>4</sup>, or an executor

<sup>1</sup> See Chapter IV. on the question of what principle is to be invoked in the interpretation of a Federal enactment in the different provinces.

<sup>2</sup> See *per* Herschell, L.C., in *McEntire v. Crossley Bros.* (1895), A. C. 457, 461; *Fisken v. Brooke* (1879), 4 O. A. R. 8, 22; *Re Wilson Estate* (1915), 33 O. L. R. 501, and notes to sections 25 and 32.

<sup>3</sup> *Waterhouse v. Jameson* (1870), L. R. 2 H. L. Sc. 29, 37, 38; *In re Duckworth* (1867), L. R. 2 Ch. 578, 580; *In re Elsworth and Tidy's Contract* (1889), 42 Ch. D. 23. The liquidator wields the powers of the company and of the creditors: *Kent v. La Communauté des Soeurs* (1903), A. C. 220, 226; 72 L. J. P. C. 61.

<sup>4</sup> See *Re Llangennach Coal Co.* (1887), 56 L. T. 475; *Re Clinton Thresher Co.* (1910), 1 O. W. N. 445; 15 O. W. R. 319; *Stewart v. Ledoux* (1872), 2 Rev. Crit. 482; *Re Fashion Shop Co.* (1915), 33 O. L. R. 253; *Fuchs v. Hamilton Tribune Co.* (1884), 10 P.R. 409. The trustee, it has been said, takes the debtor's property subject to a vendor's lien for unpaid purchase money which re-attaches when the property comes back to the debtor: *Van Wagner v. Findlay* (1867), 14 Gr. 53, and see notes to sections 2(*gg*), 6(1), 9, 10, 46.



**Chapter VI.** who has a right of retainer<sup>5</sup>, or a person who has a charge which might be avoided by other parties<sup>6</sup>, or a person who has an equitable security or an equitable right to a security<sup>7</sup>. A trustee therefore cannot obtain priority over an equitable mortgagee of a chose in action by giving notice before the mortgagee<sup>8</sup>; or by use of the *Registry Acts* acquire priority over the prior vendee of the insolvent<sup>9</sup>, for the trustee is not a transferee for value<sup>10</sup>, and a deed of assignment for the benefit of creditors does not convey any greater estate than the debtor himself has<sup>1</sup>. The trustee takes goods in the possession of the debtor subject to resilia-

<sup>5</sup> *In re May*, *Crawford v. May* (1890), 45 Ch. D. 499; *In re Simpson*, *Simpson v. Simpson* (1895), 1 Ir. R. 530; *In re Ambler*, *Woodhead v. Ambler* (1905), 1 Ch. 697.

<sup>6</sup> *Ex parte Leman in re Barrand* (1876), 4 Ch. D. 23; 46 L. J. Bank. 38; *Ex parte Payne in re Cross* (1879), 11 Ch. D. 539. The position of the trustee as regards unregistered bills of sale is more fully discussed later in this chapter.

<sup>7</sup> *Ex parte Holthausen in re Scheibler* (1874), L. R. 9 Ch. 722; 44 L. J. Bank. 26; *Kerry v. James* (1894), 21 O. A. R. 338; *Kitching v. Hicks* (1884), 6 O. R. 739; *Robinson v. Cook* (1884), 6 O. R. 590; *Zimmerman v. Sproat* (1912), 26 O. L. R. 448; *Wood v. Jagger* (1908), 9 W. L. R. 120; *Harrison v. Nipisiquit Lumber Co., Ltd.* (1912), 11 E. L. R. 314, and see *Clarkson v. Sterling* (1888), 15 O. A. R. 234. Consider the effect of *Clarkson v. McMaster* (1895), 25 S. C. R. 96, as construed by Osler, J., in *Hope v. May* (1896), 24 O. A. R. 16, 25; and see in the case of a partnership, *Ex parte Wright in re Briggs & Co.* (1906), 2 K. B. 209; 74 L. J. K. B. 591. Difficulties in enforcing such an agreement may develop by reason of section 31 with respect to fraudulent preferences and by reason of the *Provincial Bills of Sale and Chattel Mortgage Acts*, see *Kerry v. James*, *supra*; *Hope v. May* (1896), 24 O. A. R. 16; *In re Eslick ex parte Alexander* (1876), 4 Ch. D. 503.

<sup>8</sup> *In re Wallis ex parte Jenks* (1902), 1 K. B. 719; 71 L. J. K. B. 465; 9 Mans. 136; *Re William Hamilton Mfg. Co.* (1909), 1 O. W. N. 61, 421. The law in Quebec under a cession de biens appears to be otherwise. In *Dominion Bank v. Ayling* (1916), Q. R. 26 K. B. 75, it was held that the curator under a judicial abandonment of property is a third party within the meaning of Art. 1571 of the Civil Code. He can, therefore, take advantage of the fact that a person to whom the debtor has sold a right of action has not perfected his title by notice. See C. P. C. Art. 877.

<sup>9</sup> *Collver v. Shaw* (1873), 19 Gr. 599; *John Macdonald & Co., Ltd. v. Tew* (1914), 32 O. L. R. 262; *Craig v. McKay et al.* (1906), 12 O. L. R. 121.

<sup>10</sup> *In re Wallis ex parte Jenks*, *supra*; *John Macdonald & Co., Ltd. v. Tew*, *supra*; *Craig v. McKay et al.*, *supra*, and see in the case of an assignment to a trustee when there is already an undischarged receiving order in existence: *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393, 410; 63 L. J. Q. B. 806; 1 Mans. 207, and in the case of a liquidator: *Harrison v. Nipisiquit Lumber Co., Ltd.*, *supra*.

<sup>1</sup> *Re Wilson Estate* (1915), 33 O. L. R. 500; *Jones v. Barker* (1909), 1 Ch. 321; 78 L. J. Ch. 167.



tion for non-payment of the price under Art. 1543 of the C.C. of Quebec<sup>2</sup>. Where a sale of goods is induced by the fraud of the bankrupt the vendor may, within a reasonable time, and even after notice of an act of bankruptcy, disaffirm the sale and retake possession of the goods<sup>3</sup>.

Similarly the trustee may take the property of the bankrupt subject to having his title defeated by a contingency, as where contractors before their bankruptcy contract that if they do not proceed with the work the plant shall be forfeited to the owners of the lands<sup>4</sup>. Cases in which forfeiture is conditioned on non-completion of work must, however, be distinguished from cases where the forfeiture is conditioned on the bankruptcy of the contractor<sup>5</sup>, or from cases where the contract is void because of non-compliance with such Acts as *Bills of Sale Acts*<sup>6</sup>. The forfeiture may take place subsequently to the commencement of the bankruptcy<sup>7</sup>.

Just as the debtor would have had to do, so must the trustee take the usual steps to complete his title to a chose in action if he wishes to prevent others first giving notice to the person from whom the chose in action is due<sup>8</sup>, for bankruptcy is not notice to all the

<sup>2</sup> *Rosenweig v. Hart ex parte Goldfine* (1921), 1 C. B. R. 385, and 431; 56 D. L. R. 101 (Panneton, J.); *In re Prima Skirt Co., Ltd., Thompson's Claim* (1921), 1 C. B. R. 438 (Panneton, J.), and see as to estoppel in such case *In re Henning* (1921), 1 C. B. R. 461 (Panneton, J.).

<sup>3</sup> *In re Eastgate ex parte Ward* (1905), 1 K. B. 465; 74 L. J. K. B. 324; 12 Mans. 11. In this case the fraud consisted in representing that he meant to pay for the goods. The contract may even be disaffirmed after the date of the receiving order: *Tilley v. Bowman* (1910), 1 K. B. 745; 79 L. J. K. B. 547; 17 Mans. 97. Where a bankrupt would have been estopped from setting up his own fraud his trustee will likewise be estopped: *Harris v. Truman* (1882), 9 Q. B. D. 264, 274, unless the case falls within the doctrine of relation back. See notes to section 4(10).

<sup>4</sup> *Ex parte Collins re Keen* (1902), 1 K. B. 555; 71 L. J. K. B. 487; 9 Mans. 145; *In re Wilkinson ex parte Fowler* (1905), 2 K. B. 713, 720; 74 L. J. K. B. 969; 12 Mans. 377; *Ex parte Newitt in re Garrud* (1881), 16 Ch. D. 522; 51 L. J. Ch. 381.

<sup>5</sup> As in *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19.

<sup>6</sup> *Climpson v. Coles* (1889), 23 Q. B. D. 465; 58 L. J. Q. B. 346; *Church v. Sage* (1892), 67 L. T. 800.

<sup>7</sup> *Ex parte Collins in re Keen* (1902), 1 K. B. 555; 71 L. J. K. B. 487; 9 Mans. 145.

<sup>8</sup> *Palmer v. Locke* (1881), 18 Ch. D. 381; see also *In re Stone's Will* (1893), W. N. 50; *Sowerby v. Brooks*, 4 B. & A. 523; *Re Barr's Trusts*, 4 K. & J. 219.



Chapter VI. world<sup>9</sup>. But, as has already been pointed out, a liquidator or other person in the position of the debtor cannot as against an equitable chargee or assignee from the debtor allege that the chargee has not perfected his title, for in such case the liquidator stands in the shoes of the debtor<sup>10</sup>. Such a case must be distinguished from one in which there had been a contract of sale entered into before the date of the receiving order, and a deposit paid to the debtor by the purchaser, but no conveyance executed. Under these circumstances the trustee in bankruptcy becomes the legal owner of the estate, and not merely the assignee of the purchase money, and if the purchaser pays the bankrupt without notice of the title of the trustee he will not be discharged<sup>1</sup>.

While it is true in a general way that the trustee steps into the shoes of the debtor, *The Bankruptcy Act* puts the trustee in a position superior to that of the debtor. Thus the trustee occupies a superior position to that of the debtor by reason of the relation back of his title which enables him to avoid transactions entered into by the bankrupt<sup>2</sup>. The Act, moreover, expressly avoids fraudulent preferences and certain settlements and contracts; and with respect to such transactions the trustee is in a better position than the debtor<sup>3</sup>. It would appear that certain, if not all, of the debtor's transactions with his property which are acts of bankruptcy are void as against the trustee<sup>4</sup>.

<sup>9</sup> *Per* Jessel, M.R., in *Palmer v. Locke*, *supra*.

<sup>10</sup> *Re William Hamilton Mfg. Co.* (1909), 1 O. W. N. 61, 421.

<sup>1</sup> *Ex parte Rabbidge in re Pooley* (1878), 8 Ch. D. 367; 46 L. J. Bank. 15.

<sup>2</sup> *Per* Lindley, M.R., in *In re Beeston ex parte Board of Trade* (1899), 1 Q. B. 626, 630, 631; 68 L. J. Q. B. 344; 6 Mans. 27. The relation back of the title of the trustee takes place only under a receiving order. There is no relation back under an authorized assignment. The severity of the doctrine of relation back is mitigated by sec. 32. The question of relation back is fully discussed in the notes to sections 4(10) and 32. And see *per* Holmsted. R., in *re Andrew Motherwell of Canada, Ltd.* (1921), 20 O. W. N. 306, as to the effect of sec. 17(2), which puts the trustee in the position of a receiver.

<sup>3</sup> See *per* Lindley, M.R. in *In re Beeston ex parte Board of Trade* (1899), 1 Q. B. 626, 630, 631; 68 L. J. Q. B. 344; 6 Mans. 27. See secs. 31, 30, 29.

<sup>4</sup> See notes to sec. 3. Generally speaking an act of bankruptcy revokes a power of attorney, but if after the act of bankruptcy but before the adjudication the property is conveyed under the power to a



Thirdly, there are, in England at least, certain matters which are contrary to the policy of the bankruptcy law, though not expressly forbidden by the Act. Thus the limitation of a man's own property to himself until bankruptcy and then over is void as against the trustee<sup>5</sup>, though it may be good as between the parties<sup>6</sup>; and the limitation of property or its equivalent to another person, defeasible on the bankruptcy of that person, is not contrary to the bankruptcy law<sup>7</sup>. But while the trustee may attack transactions which are against the bankruptcy law, he has no status to impeach transactions (even though they are against the law of the land) in which the debtor, being *in pari delicto* with the person against whom the action is brought, could not have succeeded. Thus if the debtor before the commencement of his bankruptcy has given money away as a bribe, or has parted with money for some fraudulent<sup>8</sup> or illegal purpose such as one which prevented the discovery of a felony, the trustee cannot recover the money or the property unless his title relates back to cover the transaction<sup>9</sup>.

*bona fide* purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee: *Ex parte Snowball in re Douglas* (1872), L. R. 7 Ch. 534, 548.

<sup>5</sup> *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19; *In re Jeavons ex parte Mackay* (1873), L. R. 8 Ch. 643; 42 L. J. Bank. 68; *In re Williams ex parte Thompson* (1877), 7 Ch. D. 138; 47 L. J. Bank. 26; *Re Brewer's Settlement* (1896), 2 Ch. 503; 65 L. J. Ch. 821; but see under the then English law in the case of a voluntary assignment: *Brooke v. Pearson* (1859), 27 Beav. 181; *Knight v. Broune* (1861), 9 W. R. 515; 4 L. T. 206.

<sup>6</sup> Thus where an antenuptial settlement was made of a man's own property on trust to pay the income to him for life or until he should become outlawed or be declared a bankrupt, and from and after the determination of the trust to his wife for life, it was held that on his bankruptcy his life interest vested indefeasibly in the trustee and was no longer capable of being affected by any subsequent act of forfeiture by the debtor, for while the limitation conditioned on bankruptcy was void as against the trustee it was not void as between husband and wife: *In re Burroughs-Fowler* (1916), 1 Ch. 251; 85 L. J. Ch. 550; 2 H. B. R. 108, and see *Re Johnson ex parte Matthews and Wilkinson* (1904), 1 K. B. 134; 73 L. J. K. B. 220; 11 Mans. 14, and see notes to sec. 25.

<sup>7</sup> *Higinbotham v. Holme* (1811), 19 Ves. 88; *Mackintosh v. Pogose* (1895), 1 Ch. 505; 64 L. J. Ch. 274; 2 Mans. 27.

<sup>8</sup> *Langley v. Van Allen* (1902), 32 S. C. R. 174.

<sup>9</sup> *In re Mapleback ex parte Caldecott* (1876), 4 Ch. D. 150; 13 Cox 374; contrast *Munro v. Standard Bank of Canada* (1913), 30 O. L. R. 12, 17; 5 O. W. N. 508.



## Chapter VI.

A debtor cannot by any assignment or charge give a good title as against his trustee in bankruptcy to profits of his business accruing after the commencement of the bankruptcy; for they are not his property; and the trustee may retain them or sue for them as the case may be, without the enactment of any statutory provision purporting to give him that power<sup>10</sup>.

Similarly by reason of the nature of winding-up proceedings, a liquidator of a company has rights which the company would not have. Thus a shareholder may have taken shares under circumstances which would entitle him to say to the company while a going concern, "relieve me from these shares", but on the winding-up order being made that right is gone, unless proceedings have already been commenced to enforce it<sup>1</sup>, and a liquidator may sue directors for money paid out of capital to shareholders as interest<sup>2</sup>, or dividends<sup>3</sup>.

An important point remains to be determined, namely, whether the trustee under a receiving order or authorized assignment or a composition, extension or scheme is able without special enabling words to impeach transactions which by provincial law are avoided in favour of subsequent purchasers, of execution creditors or of creditors generally. Acts respecting *Chattel Mortgages*, *Bills of Sale*, and *Conditional Sales of Goods* are provincial Acts, which are in no way directly referred to in *The Bankruptcy Act*, except in section 30<sup>4</sup>.

The position of the assignee under the *Insolvency Act* of 1875 was covered by section 39, which read in part as follows:

<sup>10</sup> *Ex parte Nichols in re Jones* (1883), 22 Ch. D. 782; 52 L. J. Ch. 635, and see notes to sec. 2(*gg*).

<sup>1</sup> *In re London Celluloid* (1888), 39 Ch. D. 190. 204. See where delay on the part of the company prevented action by the liquidator: *In re Florence Land and Public Works Co.*, *Nichol's Case* (1885), 29 Ch. D. 421.

<sup>2</sup> *In re Sharpe, Masonic and General Life Assce. Co. v. Sharpe* (1892), 1 Ch. 154.

<sup>3</sup> *In re Exchange Banking Co.*, *Flitcroft's Case* (1882), 21 Ch. D. 519.

<sup>4</sup> See section 35. If the trustee has this right rule 120 prescribes the forum and procedure.



“The assignee in his own name as such, shall have the exclusive right to sue for the recovery of all debts due or claimed by the insolvent of every kind and nature whatsoever; . . . and to take both in the prosecution and defence of all suits, all the proceedings that the insolvent might have taken for the benefit of his estate, or that any creditor might have taken for the benefit of the creditors generally.” Chapter VI.

It was held under that section by the Court of Appeal for Ontario that an assignee in insolvency represented execution creditors for the purpose of avoiding mortgages for want of compliance with the existing *Chattel Mortgage Act*<sup>5</sup>. When the *Insolvent Act* of 1875 was repealed and the provincial system of voluntary assignments was introduced, it was held in Ontario, following older cases<sup>6</sup>, that an assignee under a voluntary assignment might not attack such transactions without express statutory authority<sup>7</sup>. This

<sup>5</sup> *Re Barrett* (1880), 5 O. A. R. 206; *Re Andrews* (1877), 2 O. A. R. 25; *Snarr v. Smith* (1880), 45 U. C. Q. B. 156. Contrast *Ontario Bank v. Wilcox* (1878), 43 U. C. Q. B. 460, 490, and *O'Callaghan v. Cowan* (1877), 41 U. C. Q. B. 272, 284, and see per Burton, J.A., in *Parke v. St. George* (1884), 10 O. A. R. 496, 510, 516, and *Bertram v. Pendry* (1877), 27 U. C. C. P. 371.

<sup>6</sup> In *McMaster v. Clare* (1859), 7 Gr. 550, it was held that assignees under a voluntary assignment could not impeach a sale made with intent to defeat or delay creditors, for if they sought to impeach it as creditors they were not execution creditors, and if they sought to impeach it as purchasers the Provincial Act (1858), 22 Vic. c. 96, ss. 18, 19, did not give subsequent purchasers the right to avoid such a transaction.

<sup>7</sup> *Lumsden v. Scott* (1883), 4 O. R. 323; *Kitching v. Hicks* (1884), 6 O. R. 739, per Strong, J., in *Burland v. Moffatt* (1884), 11 S. C. R. 76, and in *McCall v. McDonald* (1886), 13 S. C. R. 247, 256, and see remarks in *Parke v. St. George* (1882), 2 O. R. 342, 347; *Coats v. Kelly* (1886), 15 O. A. R. 81; *Re Coleman*, 56 U. C. Q. B. 559; contra, *Boynton v. Boyd*, 12 U. C. C. P. 334. The law is the same in Quebec. The Supreme Court of Canada held in *Burland v. Moffatt* (1884), 11 S. C. R. 76, that in the absence of a statutory title to sue as representing creditors such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment. See for comments on part of the judgment in *Burland v. Moffatt*, *Porteous v. Reynar* (1887), 13 A. C. 120, 130, 131; and see per Taschereau, J., in *Mitchell v. Holland* (1889), 16 S. C. R. 687, 697. The statutory title referred to was given the assignee under a cession de biens in Quebec, C. P. C. Art. 877. A similar rule prevails in other provinces: *Diehl v. Wallace* (1905), 2 W. L. R. 24; *Horne v. Galt* (1908), 1 A. L. R. 392, 398; *Lennox v. Alaska Mercantile Co.* (1906) 4 W. L. R. 333. Cf. *Bertrand v. Parke* (1892), 8 M. L. R. 175; and *Tallman v. Smcrt* (1894), 25 O. R. 661.



**Chapter VI.** resulted in amendments being made expressly conferring this power on the assignee<sup>8</sup>.

It might be thought that the position of a liquidator under the *Winding-up Act* would be similar to that of an assignee or trustee in insolvency, and that the rule laid down in *Re Barrett*<sup>9</sup> would have been applied. The authorities on this point are at present in conflict. There are cases to the effect that as the *Winding-Up Act* takes away the creditor's right of action, the liquidator stands for the creditors and is entitled to enforce their rights<sup>10</sup>, but there are cases where that right has been doubted<sup>1</sup>, and there is a clear decision of Riddell, J.,<sup>2</sup> holding that a liquidator cannot take advantage of the provisions of *The Bills of Sale Act*<sup>3</sup>, under which it is provided that mortgages and conveyances not registered as in the Act provided, "shall be absolutely null and void as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith and for valuable consideration." That very learned Judge said, "We have a statute which makes void perfectly legitimate and proper transactions and this statute must be read strictly. I think that one who is not a creditor cannot claim as though he were a creditor unless he can bring himself within the words of the Act"<sup>4</sup>.

It has also been held by the Supreme Court of New Brunswick,<sup>5</sup> that the liquidator under *The Winding-Up*

<sup>8</sup> See 55 Vic. c. 26 (Ont.) amending R. S. O. 1887, c. 125, and per Osler, J.A., in *Kerry v. James* (1894), 21 O. A. R. 338; *Hope v. May* (1897), 24 O. A. R. 16, 26.

<sup>9</sup> (1880), 5 O. A. R. 206.

<sup>10</sup> *Re Canadian Camera Co., William's Claim* (1901), 2 O. L. R. 677, 679; *National Trust Co. v. Trusts and Guarantee Co.* (1912), 26 O. L. R. 279; see also *Johnston v. Wade* (1908), 17 O. L. R. 372. If the question whether the trustee can sue depends on whether the creditors are by *The Bankruptcy Act* deprived of their right of action against the debtor (*In re South Essex Estuary and Reclamation Co.* (1869), L. R. 4 Ch. 215, 217), it should be noted that there is no absolute deprivation under sections 6(1), 7 and 13a of *The Bankruptcy Act*. See *Kitching v. Hicks* (1884), 6 O. R. 739, and s. 35.

<sup>1</sup> *Rainy Lake Lumber Co.* (1888), 15 O. A. R. 749; *Kinsman v. Parker* (1919), 52 N. S. R. 553; 1 C. B. R. 161.

<sup>2</sup> *Re Canadian Shipbuilding Co.* (1912), 26 O. L. R. 564; 3 O. W. N. 1476; 4 O. W. N. 157.

<sup>3</sup> R. S. O. (1897), c. 148.

<sup>4</sup> *Ibid.*, p. 1479.

<sup>5</sup> *Harrison v. Nepisiquit Lumber Co., Ltd.* (1912), 11 E. L. R. 314.



*Act* is not in the position of an assignee in bankruptcy Chapter VI. or of an execution creditor<sup>6</sup>, and that *The Winding-Up Act* is not a "law relating to insolvency" within the meaning of the *New Brunswick Bills of Sale Act*, on the ground that *The Winding-up Act* provides for the winding-up of companies organized under Dominion charters where the company may be solvent<sup>7</sup>.

On the other hand, there is the argument to be found in the English practice under 13 Eliz. c. 5, with respect to the avoidance of conveyances which "delay, hinder or defraud creditors or others." In the interpretation of that statute it has been held that the representatives of creditors are considered creditors within the Act<sup>8</sup>, and that the bankruptcy law puts the trustee in the position of the representative of all the creditors, thus giving him a higher and better title than the bankrupt himself<sup>9</sup>.

<sup>6</sup> Following a remark of Kay, J., in *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch. D. 43, 51.

<sup>7</sup> *Harrison v. Nepisiquit Lumber Co., Ltd.*, *supra*, at p. 327. See Chap. IV. While it may yet be open to argument whether without apt words in a statute conferring that right on him the liquidator of a company can attack a bill of sale on the ground that the technicalities of the Act have not been complied with, it seems that he cannot object that there has been some defect in the resolutions or internal proceedings of the company which invalidate the mortgage; for in that respect he stands in the position of the company: *Hammond v. Bank of Ottawa* (1910). 22 O. L. R. 73.

<sup>8</sup> *Doe d. Grimsby v. Ball* (1843), 11 M. & W. 531, where Parke, B., said: "The assignee of an insolvent debtor represents the creditors for all purposes, and if any fraud exists in a transaction to which the insolvent was a party, the assignee may take advantage of it. A deed which is void as against creditors is void also as against those who represent creditors." Alderson, B., said in the same case: "If a deed be void as against creditors the assignees who represent creditors may avoid it," and see *Martin v. Pewtress* (1769), 4 Burr. 2477; *Anderson v. Malby*, 2 Ves. Jr. 244, 255; *Ex parte Russell in re Butterworth* (1882), 19 Ch. D. 588; *In re Lane-Fox ex parte Gimblett* (1900), 2 Q. B. 508, 512; see as to the rights of a creditor in Ontario suing to set aside a conveyance as fraudulent under 13 Eliz. c. 5; *Oliver v. McLaughlin* (1893), 24 O. R. 41; *Urquhart v. Aird* (1905), 6 O. W. R. 155; *Tierney v. Slattery* (1906), 7 O. W. R. 489, and *McDonald v. Curran* (1909), 1 O. W. N. 121. See as to the effect of section 17(2) of *The Bankruptcy Act*, per Holmsted R., *In re Andrew Motherwell of Canada, Limited* (1921), 20 O. W. N. 306.

<sup>9</sup> *Per James, L.J.*, *In ex parte Butters in re Harrison* (1880), 14 Ch. D. 265, 267. See also where the point at issue was whether the proceedings should be taken in the bankruptcy court or in the ordinary courts: *In ex parte Brown in re Yates* (1879), 11 Ch. D. 148. James, L.J., said in the course of the argument, "when the trustee takes only what the bankrupt himself would have taken the matter should be left



Chapter VI. See further as to the right of creditors and others to take advantage of technical objections under *Bills of Sale Acts* and legislation *in pari materia*, *Heaton v. Flood*<sup>10</sup>, *Meriden Britannia Co. v. Braden*<sup>1</sup>, *Clarkson v. McMaster*<sup>2</sup>, and *Gillard v. Bollert*<sup>3</sup>.

to the ordinary tribunals. But where by the operation of the bankrupt law the trustee claims by a higher and better title than the bankrupt the matter is one which was intended to be dealt with by the court of bankruptcy." See also *per* Bramwell and James, L.JJ., *In ex parte Ball re Shepherd* (1879), 10 Ch. D. 667; 48 L. J. Bank. 57; but contrast *per* Baggallay, L.J., in S. C.. The question of the court is covered by Rule 120.

<sup>10</sup> (1898), 29 O. R. 87.

<sup>1</sup> (1894), 21 O. A. R. 352.

<sup>2</sup> (1895), 22 O. A. R. 138; 25 S. C. R. 96.

<sup>3</sup> (1893), 24 O. R. 147.



## 9-10 GEO. V., CHAPTER 36.

(As amended by Chaps. 34 and 17 of the Statutes of 1920 and 1921.  
Office consolidation).

## AN ACT RESPECTING BANKRUPTCY.

(Assented to July 7th, 1919.)

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Sections  
1 to 2(a)

## SHORT TITLE.

1. This Act may be cited as *The Bankruptcy Act* Short title.

## INTERPRETATION.

2. In this Act, unless the context otherwise requires or implies, the expression:—

**Cross References Rules:** Further definitions 2.

See generally as to Interpretation of Dominion Statutes, R. S. C. 1906, c. 1, *The Interpretation Act*. In cases in which the Bankruptcy Act utilizes Provincial Law the definitions in Provincial Interpretation Acts may be applicable.

- 2 (a) "affidavit" includes statutory declaration "Affidavit," and affirmation:

**Cross References Act:** Petition verified by 4(2); affidavit for registration 11(11); sworn before whom 11(12) and 79.

**Cross References Rules:** Generally 26 to 33; when filed 18; written proceedings 8.

**Cross References Forms:** Affidavit by debtor as to after-acquired property 77; in support of order of committal 54, 55; in support of application to adjust rights of contributories 40; of justification 12; of service of petition 5; new or substituted trustee 35; truth of statements in petition 3, 4; fees for drawing, see *Tariff of Costs*; affidavit verifying application by trustee for discharge 43; of execution of assignment 19.



**Sections**  
**2(b) to 2(f)** See as to when affirmation may be taken in lieu of oath, Canada Evidence Act, R. S. C. 1906, c. 145, s. 15 (1) (2).

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**"Alimentary Debt."** 2 (b) "alimentary debt" means a debt incurred for necessities or maintenance:

**Cross References Act:** 13(12) and see as to necessities of life 61(1) (d).

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**"Appeal Court."** 2 (c) "Appeal Court" means the court having jurisdiction in bankruptcy, under this Act, on appeal:

**Cross References Act:** Appeal Courts of Bankruptcy 63 (3).

**Cross References Rules:** Appeals 68 to 73.

**Analogous Legislation:** English Act, 1914, Rule 3.

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**"Assignment."** 2 (d) "assignment" includes conveyance:

**Cross References Act:** Authorized assignment 2(b); an act of bankruptcy 3(a); and composition, see 13(15); of book debts 30; assignor 2(e); authorized assignor 2(g).

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**"Assignor."** 2 (e) "assignor" means the maker of an assignment, whether under this Act such maker may lawfully make such assignment or such assignment may lawfully be made, or not:

**Cross References Act:** Authorized assignor 2(g); see 13(15); assignment 2(d); authorized assignment 2(f).

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**"Authorized assignment."** 2 (f) "authorized assignment" means an assignment made as provided in this Act to an authorized trustee by an authorized assignor of all his property for the general benefit of his creditors:

**Cross References Act:** Assignment includes conveyance 2(d); authorized assignment may be made 9; form of 10; effect of 10, 11(1) (a) (b), 11(10); not within operation of provincial laws 11(4); to



be registered in certain cases 11(8)(14); effect of non-registration 11(15); mistakes in 12; authorized trustee 14; an authorized assignment an act of bankruptcy 3(a). **Sections**  
**2(g), 2(h)**

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**Cross References Forms:** Assignment for the general benefit of creditors 18, 19.

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2 (g) "authorized assignor" means an insolvent assignor whose debts provable under this Act exceed five hundred dollars: "Authorized assignor."

**Cross References Act:** Assignor defined 2(e); insolvent defined 2(t); authorized assignment 2(f), 9, 10.

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2 (h) "available act of bankruptcy" means an act of bankruptcy committed within six months before the date of (1) the presentation of a bankruptcy petition, or (2) the making of an authorized assignment, or (3) the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction mentioned in section thirty-two of this Act. "Available act of bankruptcy."

**Cross References Act:** Acts of bankruptcy 3; bankruptcy petition 4; authorized assignment 9, 10; what is not an available act of bankruptcy 8(2); effect of notice of an available act of bankruptcy 32(1)(d)(ii).

**Analogous Legislation:** English Act, 1914, s. 167.

This is the section which was enacted by *The Bankruptcy Act Amendment Act, 1921*<sup>1</sup>.

While some meaning can be given to clauses (2) and (3) of the amendment, they raise difficulties:

By section 3(a) of the Act an authorized assignment constitutes an act of bankruptcy. By sections 3(a) and 4(1)(3), an authorized assignment made within six months before the presentation of a bankruptcy petition is an available act of bankruptcy. But clause (2) of the amendment in effect says that any other act of bankruptcy committed within six months prior to the

<sup>1</sup> The previous section read:—

2(h) "available act of bankruptcy" means an act of bankruptcy available for a bankruptcy petition at the date of the presentation of a petition on which a receiving order is made.



Sections 2(i), 2(j) making of the authorized assignment in question is made an available act of bankruptcy. This probably was not intended. It is contrary to the express wording of section 4(3)(b).

Turning now to clause (3). Section 32 is designed only to protect transactions which would be affected by the relation back of the title of the trustee. Under our Act the relation back of the title of the trustee is much less extensive than under the English Act. Under that Act the title of the trustee relates back to the time at which the act of bankruptcy was committed on which a receiving order is made. Under our Act the relation back of the title of the trustee is to the date of the presentation of the petition on which the receiving order is made. Under our Act therefore section 32 protects only those transactions which take place after the date of the presentation of the petition. Had clause (3) of the amendment not been made, the word "available act of bankruptcy" in section 32 would have meant an act of bankruptcy committed within six months before the date of the presentation of a bankruptcy petition. The effect of the amendment in clause (3) may therefore be to cut down that period to six months before the transaction complained of.

"Banker."

2 (i) "banker" includes any person owning, conducting or in charge of any bank or place where money or securities for money are received upon deposit or held subject to withdrawal by depositors:

**Cross References Act:** Duties of 34; rights of banks preserved 88; bank defined 2(j).

"Chartered bank."

2 (j) "bank" or "chartered bank" means an incorporated bank carrying on the business of banking under *The Bank Act*;

**Cross References Act:** Banker, defined 2(i); corporation does not include bank 2(k); rights of banks preserved 88.



2 (k) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the Provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies: Sections  
2(k) to 2(m)  
"Corporation."

**Cross References Act:** As to winding-up 2(o), and see 66(2); creditor in the case of 2(m); person includes corporation 2(aa); contributories to 36; may vote 42(18); may act by any officer under seal 85; directors, officers and shareholders are restricted creditors of 48(4).

**Cross References Rules:** Affidavits on behalf of 32; as to winding-up proceedings 13; service on 82; contributory defined 2(1).

R. S. C. 1906, c. 144, *The Winding-up Act* does not apply to building societies which have *not* a capital stock. R. S. C. 1906, c. 144, s. 7.

It has been held that a foreign corporation carrying on business in Canada may be adjudged bankrupt. *In re National Shipbuilding Co.*, (1921) 1 C. B. R. 430 (Panneton, J.).

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2 (l) "court" or "the court" means the court which is invested with original jurisdiction in bankruptcy under this Act: "Court."  
"The Court."

**Cross References Act:** See generally sections 63 to 74; appeal court 2(o); application to 35, 39, 40(2), 46(8), 53(2); approval of obtained by fraud 13(14); where wrong court chosen 4(4), 6(4); with respect to a composition, etc. 13(15); powers of, see Index.

**Cross References Rules:** Defined 2(1); see generally 4 to 6; proceedings 7 to 13; motions and practice 14 to 19; security in court 21 to 25; affidavits 26 to 33; rules relating to business of the court 63 to 66.

**Analogous Legislation:** English Act, 1914, s. 167; Rule 3.

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2 (m) "creditor" with relation to any meeting held under authority of this Act, shall, in "Creditor."



**Sections**  
**2(n), 2(o)**

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the case of a corporation, include bondholder, debenture-holder, shareholder and member of the corporation, and each class thereof shall in meeting express its views or wishes in manner prescribed by General Rules.

**Cross References Act:** Creditor may include surety 31(2); secured creditor 2(*gg*), 46; restricted 48, 29(2); favoured 51(2), 52(1); meetings of 42.

**Cross References Rules:** Defined 2(1); notice of meeting to 112; different classes of creditors to express views separately 114; disputes between different classes of creditors 114.

**Cross References Forms:** Notice of meeting 20, 21, 32.

See under section 4(1) as to creditors who may present a bankruptcy petition; and under section 17 the position of the trustee with respect to creditors generally. Who are creditors, and what are their rights, may to a certain extent depend on provincial law; for example, the right of landlords may differ in different provinces notwithstanding the provisions of section 52. Compare the notes to section 2 (*o*) *debtor*, as to provincial and Dominion laws respecting status. As to the rights of secured creditors, see sections 46, 42(10).

"Debt provable in bankruptcy."  
"Provable debt."  
"Debt provable."

2 (*n*) "debt provable in bankruptcy" or "provable debt" or "debt provable" includes any debt or liability by this Act made provable in bankruptcy or in proceedings under an authorized assignment:

**Cross References Act:** Debts provable 44, 49, 50; and see 29(3) and 52(2) (3); method of proof 45, 46.

**Cross References Rules:** Proof of debts 115 to 119.

**Cross References Forms:** Proof of debt 47, 48.

**Analogous Legislation:** English Act, 1914, s. 167.

"Debtor."

"2 (*o*) "debtor" includes any person, whether a British subject or not, who, at the time when



any act of bankruptcy was done or suffered Section 2(o) by him, or any authorized assignment was made by him, (a) was personally present in Canada, or (b) ordinarily resided or had a place of residence in Canada, or (c) was carrying on business in Canada personally or by means of an agent or manager, or (d) was a corporation or a member of a firm or partnership which carried on business in Canada; and where the debtor is a corporation, as defined by this section, the *Winding-up Act*, chapter one hundred and forty-four of the Revised Statutes of Canada, 1906, shall not, except by leave of the court, extend or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force or afterwards, by leave of the court, may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

**Cross References Act:** Generally see Index. As to the use of the phrase "Debtor (whether a bankrupt, assignor or person who has proposed a composition, etc.)" see section 2(x). Corporation defined 2(k); married women 2(v), 75; petition against partners 69, 70; the Act does not apply to wage-earners and farmers 8(1); wage-earner defined 2(kk); Rules relating to corporations 66.

**Cross References Rules:** Generally see Index. Rules relating to corporations 13, 32, 82, 122 to 130.

**Cross References Forms:** Warrant of arrest of 61; appointment for examination of 62.

**Analogous Legislation:** English Act, 1914, s. 1(2), and see s. 4(1) (d); Rule 3.

#### ANALYSIS OF NOTES.

Debtor.  
Wage-earners and farmers.  
Infants.  
Unmarried or widowed women.  
Married women.  
Indians.  
Lunatics.  
Convicts.  
Where the debtor is a corporation.  
Foreigner.  
Time when act of bankruptcy was done.



Section 2(o)	Ordinarily resided.
	Place of residence.
	Carrying on business.
	Onus of proof.

This sub-section was, by 10-11 Geo. V. c. 34, *The Bankruptcy Act Amendment Act*, 1920, substituted for the original sub-section<sup>1</sup>.

Debtor.

It was decided under the old bankruptcy statutes that no person who was not a debtor could be made a bankrupt, and no person could be a debtor unless a remedy could be had against him personally as upon and for a debt<sup>2</sup>. It was therefore important to consider not only the *status* of persons with respect to their capacity to contract but also the remedies against particular classes of judgment debtors. The *status* of infants, married women and lunatics, under the Act, may vary in the different provinces, depending on the local law. The *status* of Indians depends on Dominion law.

Wage-earners and farmers.

The bankruptcy provisions of the Act (Part I) do not apply to wage-earners or to persons engaged solely in farming or the tillage of the soil<sup>3</sup>.

Infants.

Although by English common law an infant can contract a debt for necessities, which term includes not only meat and drink, but all articles fit to maintain him in his station<sup>4</sup>, it has not been decided whether the incurring of such a debt renders him subject to

<sup>1</sup> The original sub-section read:—

(o) "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, (a) was personally present in Canada, or (b) ordinarily resided or had a place of residence in Canada, or (c) was carrying on business in Canada personally or by means of an agent or manager, or (d) was a corporation or a member of a firm or partnership which carried on business in Canada: and where the debtor is a corporation, as defined by this section, the *Winding-up Act*, chapter one hundred and forty-four of the Revised Statutes of Canada, 1906, shall not extend or apply to it, notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made.

<sup>2</sup> *Per Brett, L.J.*, in *Ex parte Jones in re Grissell*, 1879, 12 Ch. D. 484, 488; 48 L. J. Bank 109.

<sup>3</sup> Section 8(1).

<sup>4</sup> *Hands v. Slaney* (1800), T. R. 578; *Peters v. Fleming* (1840), 6 M. & W. 42; 9 L. J. Ex. 81; *Ryder v. Wombell*, 1868, L. R. 4 Ex. 32; 38 L. J. Ex. 8.



proceedings in bankruptcy founded thereon<sup>5</sup>. It Section 2(o) has, however, been held that an infant who has traded cannot be adjudicated a bankrupt on the petition of a person who has supplied him on credit with goods for trade purposes, but to whom he has made no express representation that he was of full age<sup>6</sup>. Whether, if the infant had expressly represented himself to be of full age an adjudication could be made *quicere*<sup>7</sup>. The fact that an infant himself files a liquidation proceeding, which is an act of bankruptcy, does not enable him to be made a bankrupt; for it does not alter his *status*<sup>8</sup>.

An unmarried woman or a widow has by English Unmarried  
or widowed  
women. common law full *status*, and may therefore become a debtor within the meaning of the Act.

A married woman, so far as she is constituted a Married  
women. *femme sole* by the Bankruptcy Act may probably be adjudged bankrupt<sup>9</sup>, for not only has she *status* to contract, but section 75 provides that judgment against her shall have effect as though she were personally bound. Section 75, however, applies only to married women who are traders. Under the corresponding

<sup>5</sup> *In re Soltykoff ex parte Margrett* (1891), 1 Q. B. 413; 60 L. J. Q. B. 339; 8 Mor. 27.

<sup>6</sup> *Ex parte and in re Jones* (1881), 18 Ch. D. 109; 50 L. J. Ch. 673

<sup>7</sup> *Ex parte and in re Jones, supra*. See *Levene v. Brougham*, 53 Sol. J. 243; 25 T. L. R. 265, and *R. Leslie, Ltd. v. Sheill* (1914), A. C. 607; 3 K. B. 607; 83 L. J. K. B. 1145.

<sup>8</sup> *Ex parte and in re Jones, supra*, at 123 and 126, and see as to an assignment by a firm in which there is an infant partner: *Powell v. Calder*, 8 O. R. 505.

The effect of the following statutes and cases should be considered:—Ontario (1914), R. S. O. c. 102, Statute of Frauds, s. 7; Quebec, see Civil Code, Articles 985-987; Nova Scotia, 1900, R. S. N. S. c. 141, Statute of Frauds, s. 9; New Brunswick, 1908, C. S. N. B. c. 140, Statute of Frauds, s. 6; Prince Edward Island, see Lefroy, Constitutional Law of Canada, ed. 1918, p. 52; Manitoba, *Sinclair v. Mulligan* (1888), 5 M. L. R. 17; British Columbia, 1911, R. S. B. C. c. 107, Infants' Act, ss. 39, 40, 41; Alberta, R. S. C., 1886, c. 50, s. 11, 1905 (Dom.) 4-5 Ed. VII. c. 3, s. 16, and see *Brand v. Griffin* (1908), 1 Alta. L. R. 510; Saskatchewan, R. S. C., 1886, c. 50, s. 11; 1905 (Dom.), 4-5 Ed. VII. c. 42, s. 16; North-West Territories, R. S. C., 1906, c. 62, s. 12, and compare Bills of Exchange Act, R. S. C., 1906, c. 119, ss. 26, 48.

See on the English Infant's Relief Act: *Ex parte Kibble in re Onslow* (1875), L. R. 10 Ch. 373; 44 L. J. Bank. 63.

<sup>9</sup> See where a married woman is considered a *femme sole*, her husband being *civiliter mortuus*: *Ex parte Franks* (1831), 7 Bing. 762, and see *La Vie v. Phillips* (1765), 3 Burr. 1776; *Sparrow v. Carruthers*, 2 W. B. 1197; *Ramsden v. Brearley*, L. R. 10 Q. B. 147; 44 L. J. Q. B. 46.



**Section 2(o)** English section it has authoritatively been held that a married woman who is not a trader<sup>10</sup> is not subject to the bankruptcy laws although she has separate estate<sup>1</sup>, for execution does not issue against her person<sup>2</sup>. The effect of section 2(v), which is not in the English Act, should not be overlooked. That

<sup>10</sup> A married woman continues to trade so long as her trade debts or liabilities for torts are undischarged: *In re Worsley* (1901), 1 K. B. 309; 70 L. J. K. B. 92; 8 Mans. 8; *In re Dagnall* (1896), 2 Q. B. 407; 65 L. J. Q. B. 666; 3 Mans. 218; *In re Reynolds ex parte White Bros., Ltd.* (1915), 2 K. B. 186; 59 Sol J.; (1915), W. N. 84. A trade belonging exclusively to a married woman, but managed by her husband on her behalf, is a trade carried on by the married woman separately from her husband: *In re Simon* (1909), 1 K. B. 201; 78 L. J. K. B. 392; 16 Mans. 96, and see *In re Florence Edwards ex parte Harvey*, 2 Mans. 182, and *In re Worsley*, *supra*.

<sup>1</sup> *In re Gardiner ex parte Coulson* (1887), 20 Q. B. D. 249; 57 L. J. Q. B. 149; 5 Mor. 1. Before the common law was altered by statute a woman who married lost her *status* to contract; and all her property passed to her husband. Accordingly she could not be sued in contract. If she entered into a contract without the authority of her husband, there was no remedy in respect of it; and if she entered into a contract with his authority, he alone could be sued on it: *In re and ex parte Morley, Scott v. Morley* (1887), 20 Q. B. D. 120; 57 L. J. Q. B. 43; 4 Mor. 286. In England the Married Woman's Property Act, 1882, 45 & 46 Vic. c. 75, in giving to a woman the right of separate estate, gave her the right to sue and be sued; but made damages or costs recovered against her payable out of her separate property only. Execution did not issue against her person. At common law, however, a judgment against a married woman was in certain cases personal, as where contracts made by her before marriage were not sued on until after her marriage, or where she had committed certain torts: *In re and ex parte Morley, Scott v. Morley*, *supra*. In all the Provinces except Quebec and Saskatchewan the statute law regarding capacity of married women to contract is similar to the present English Statute law. In Saskatchewan every married woman is capable of entering into and rendering herself liable on contract as if she were a *femme sole*. The effect of the following statutes should be considered: Ontario, R. S. O. 1914, c. 149, c. 150; Quebec, see Civil Code Articles 985-987, 173-184, R. S. Q. 1909, Art. 7255; Nova Scotia, 1900, R. S. N. S. 112; New Brunswick, 1903, C. S. of N. B., c. 78; Prince Edward Island, 1903, 3 Ed. VII. c. 9, amended 1908, 8 Ed. VII. c. 5; Manitoba, 1913, R. S. M. c. 106; British Columbia, 1911, R. S. B. C. 152; Alberta, R. S. C. 1886, c. 50, s. 11; C. O. N. W. T. 1898, c. 47, (1905) 4-5 Ed. VII. c. 3; Saskatchewan 1909, R. S. S. c. 45; North-West Territories, Ordinances of N. W. T. 1911, c. 47, and see R. S. C. 1906, c. 62, s. 12.

<sup>2</sup> *Ex parte Jones in re Grissell* (1879), 12 Ch. D. 484; 48 L. J. Bank 109; *Re Frances Handford & Co.* (1899), 1 Q. B. 566; 68 L. J. Q. B. 386; 6 Mans. 131. In England it has been held that although judgment has been obtained against a woman while single, she is not subject to the bankruptcy laws if she marries before the receiving order is made, and is not carrying on a trade: *In re and ex parte a Debtor* (1898), 2 Q. B. 576; 67 L. J. Q. B. 820; 5 Mans. 122. Compare section 75 and 2 (v) with the English Act 1914, 4 & 5 Geo. V. c. 59, s. 125 (1), (2); and see *In re Gardiner ex parte Coulson* (1887), 20 Q. B. D. 249; 57 L. J. Q. B. 149; 5 Mor. 1.



section reads “ ‘judgment’ or ‘execution’ or ‘attach- Section 2(o)  
ment’ shall have operation as if by law the liability of married women thereon and thereunder were personal as well as proprietary<sup>3</sup>. ”

As to *status* of Indians, see *The Indian Act*, Indians.  
R. S. C. 1906, c. 81, especially sections 38-43, 102-106.

In dealing with the matter of lunatics, two ques- Lunatics.  
tions present themselves, first as to whether a lunatic can commit an act of bankruptcy; second, as to whether a lunatic can be adjudged bankrupt.

First, as to whether a lunatic can commit an act of bankruptcy. It seems that under the English Act a lunatic cannot commit an act of bankruptcy by omitting to pay or give security<sup>4</sup>. But a person of unsound mind not being a lunatic so found by inquisition on obtaining his discharge from an asylum is deemed to have recovered his sanity, and is able to commit an act of bankruptcy notwithstanding that an order is still in force appointing a receiver of his property<sup>5</sup>. Where a person has been found lunatic by inquisition, so long as the inquisition has not been superseded he cannot even during a lucid interval execute a valid deed dealing with his property<sup>6</sup>.

As to the second question: The Courts have been unwilling to decide whether a lunatic so found by inquisition can be made a bankrupt against the will of his committee<sup>2</sup>. A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so

<sup>3</sup> As to married women generally see *In re and ex parte Morley*, *Scott v. Morley*, *supra*, and *In re Gardiner ex parte Coulson*, *supra*; *In re Lynes ex parte Lester* (1893), 2 Q. B. 113; 62 L. J. Q. B. 372; 10 Mor. 124. As to a married woman who is a creditor of her husband see section 48.

<sup>4</sup> *Ex parte Stamp & Jones in re Spence* (1846), De Gex. 345.

<sup>5</sup> *In re Belton* (1913), 108 L. T. 344; 57 Sol. J. 343; 29 T. L. R. 313. See as to capacity to render himself liable for necessities: *In re Rhodes* (1890), 44 Ch. D. 94; 59 L. J. Ch. 298. See as to pleading *Imperial Loan v. Stone* (1892), 1 Q. B. 599; 61 L. J. Q. B. 449.

<sup>6</sup> *In re Walker* (1905), 1 Ch. 160; 74 L. J. Ch. 86; *In re R. S. A.* (No. 1) (1901), 2 K. B. 32; 70 L. J. K. B. 475; 8 Mans. 164.

<sup>2</sup> *Per Phillimore, J.*, *In re Belton* (1913), 108 L. T. 344, 345; 57 Sol. J. 343; 29 T. L. R. 313; *In re Farnham* (No. 1) (1895), 2 Ch. 799; 64 L. J. Ch. 717; 3 Mans. 109; *Ex parte Layton* (1801), 6 Ves. 434; but see *Anon.* (1807), 13 Ves. 590. Section 85 provides that for all the purposes of the Act a lunatic may act by his committee or by the guardian or curator of his property.



Section 2(o) found by inquisition<sup>3</sup>, but where it appears to be for the benefit of a lunatic so found that he should be made a bankrupt the Court has given leave to the committee in the name of the lunatic to file a declaration of insolvency<sup>4</sup>.

Convicts.

It has been held in England that in spite of section 8 of the English Act, 33 & 34 Vic. c. 23, a convict being liable to pay his debts after as well as before conviction, he may be made a bankrupt upon an act of bankruptcy committed either before or after conviction<sup>5</sup>.

Where the debtor is a corporation.

Where the debtor is a corporation *The Winding-Up Act* is not to apply without leave of the Court. For the purpose of providing for rules having application to corporations *The Winding-Up Act* is deemed part of the Act<sup>6</sup>. In cases of winding-up other than on the ground of insolvency *The Winding-Up Act* will still apply. The effect of the authorized assignment and composition sections as applied to a corporation have yet to be determined. Corporation does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies<sup>7</sup>.

Foreigners.

The old law was that there could be no bankruptcy of an alien unless some act had been done in England or the debtor had come to England<sup>8</sup>, and this principle was affirmed in the House of Lords in 1901, in the case of *Cooke v. Vogeler Co.*<sup>9</sup>, on the ground that a territorial limitation must be given to the word debtor as used in the Act of 1883. In view of that decision the English section corresponding with section 2(o) was passed, as well as a further section 4 (1)(d), which has not been reproduced in *The Bankruptcy Act*<sup>10</sup>.

<sup>3</sup> *Ex parte and in re Cohen* (1879), L. R. 10 Ch. D. 183, 184.

<sup>4</sup> *In re James* (a lunatic) (1884), 12 Q. B. D. 332; 53 L. J. Q. B. 575; *In re Lee* (1883), 23 Ch. D. 216, and see *Anon.*, *supra*. Contrast *per Willes, C.J., Crispe v. Perritt* (1744), Willes 467, 473.

<sup>5</sup> *Ex parte Graves re Harris* (1881), 19 Ch. D. 1, 51 L. J. Ch. 1.

<sup>6</sup> See section 66 and Rules 13, 32, 82, 122 to 130.

<sup>7</sup> See section 2(k).

<sup>8</sup> *Bird v. Sidgwick* (1692), 1 Salk. 110.

<sup>9</sup> (1901) A. C. 102; 70 L. J. K. B. 181; 8 Mans. 113.

<sup>10</sup> See 4 & 5 Geo. V. c. 59 (Imp.) ss. 1(2), 4(1)(d).



The time when any act of bankruptcy or any authorized assignment was made means the actual time of the day<sup>11</sup>. Judicial acts are usually referred to the first moment of the day, in this respect differing from acts of parties<sup>1</sup>. Acts of bankruptcy are defined in section 3. As to the making of an authorized assignment, see sections 9 and 10.

Section 2(o)  
Time when  
an act of  
bankruptcy  
was done.

The section distinguishes between the place where a debtor ordinarily resided and his place of residence. Where a debtor "ordinarily resided" is a question of fact<sup>2</sup>. It is possible to have an ordinary residence in England and also an ordinary residence in Brussels. The fact that a debtor who was not domiciled in England had for eighteen months a room at an hotel in London for which he paid continuously whether he was there or not, pointed to an ordinary residence in England<sup>3</sup>.

Ordinarily  
resided.

The phrase "place of residence" is broader than the phrase "dwelling house", which appears in section 3(d). Five furnished rooms in a house may be a "dwelling house"<sup>4</sup>. Where a house has been given up and abandoned as a residence it is no longer a "dwelling house", even though the lease has not been disposed of<sup>5</sup>.

Place of  
residence.

A person continues to carry on his business so long as the debts he has incurred remain unpaid<sup>6</sup>. Similarly a company is "doing business" in Canada, while unsatisfied obligations remain from business which had been carried on and discontinued<sup>7</sup>.

Carrying on  
business.

<sup>11</sup> *In re Bumpus ex parte White* (1908), 2 K. B. 330; 77 L. J. K. B. 563; 15 Mans. 103; *Thomas v. Desanges* (1819), 2 B. & A. 586; *Green v. Lawrie* (1847), 1 Ex. 335; 17 L. J. Ex. 61.

<sup>1</sup> *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63; 51 L. J. Q. B. 1; *Edwards v. Reginam* (1854), 9 Ex. R. 628; *Ex parte and in re Pollard* (1903), 2 K. B. 41; 72 L. J. K. B. 509; 10 Mans. 152.

<sup>2</sup> *Ex parte and in re Charles Bright* (1903), 19 T. L. R. 203 C.A.

<sup>3</sup> *In re Norris ex parte Reynolds* (1888), 5 Mor. 111, contrast *In re and ex parte Erskine* (1893), 10 T. L. R. 32; see also *Ex parte Creditors in re A Debtor* (1894), 14 T. L. R. 569; *In re Charles Bright* (1901), 18 T. L. R. 37.

<sup>4</sup> *In re and ex parte Hecquard*, 24 Q. B. D. 71; 6 Mor. 282.

<sup>5</sup> *In re Nordenfeldt ex parte Morin* (1895), 1 Q. B. 151; 64 L. J. Q. B. 182; 2 Mans. 20 C.A. See also *Ex parte Cunningham in re Mitchell* (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; 1 Mor. 137.

<sup>6</sup> *Ex parte Bamford* (1808), 15 Ves. 449; *In re Worsley* (1901), 1 K. B. 309; 70 L. J. K. B. 92; 8 Mans. 8; *In re Reynolds ex parte White Bros. Ltd.* (1915), 2 K. B. 186. See also section 2 (x).

<sup>7</sup> *Scott v. Hyde* (1908), Q. R. 18 K. B. 138.



**Sections 2(p) to 2(r)** *In re Barne, ex parte Barne*<sup>s</sup>, it was held that the onus is on the petitioning creditor to prove the residence of the debtor, but if there is no reason to suppose that the debtor will dispute this it is not necessary in the first instance to adduce evidence on this point.

**Onus of proof.**

**"Discharge."** 2 (p) "discharge" means the release of a bankrupt or authorized assignor from all his debts provable in bankruptcy or under an authorized assignment save such as are excepted by this Act:

**Cross References Act:** Application for 58; power of court to grant refuse, etc., 58(4) (5); facts on which refused 59; effect of 61; annulment of adjudication 62.

**Cross References Rules:** Rules respecting 135 to 144.

**Cross References Forms:** Forms respecting 66 to 81.

**"Gazetted."** 2 (q) "gazetted" means published in the *Canada Gazette*:

**Cross References Act:** Notice to be gazetted in certain cases: of receiving order or making of A.A. 11(4); of appointment of new trustee 15(3); of order of discharge 61(5); of order annulling bankruptcy 62(3); notice to be evidence 77(3) (4).

**Analogous Legislation:** English Act, 1914, s. 167.

Note that "published" is not defined. *Quære*, whether in 11(14)(15) "published" includes "gazetted".

**"General rules."**

2 (r) "general rules" includes forms:

**Cross References Act:** Authority to make rules 66.

**Cross References Rules:** Non-compliance with rules not to render proceedings void 146.

**Analogous Legislation:** English Act, 1914, s. 167.

<sup>s</sup> (1886) 16 Q. B. D. 522; 3 Mor. 33, explaining *Ex parte Cunningham in re Mitchell* (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; 1 Mor. 137.



2 (s) "goods" includes all chattels personal and moveable property: Sections  
2(s), 2(t)

"Goods."

**Cross References Act:** Removing or secreting is an act of bankruptcy 3(g); bulk sale of may be act of bankruptcy 3(h); debtor removing may be arrested 55(1) (b) (c); property defined 2 (dd).

**Analogous Legislation:** English Act, 1914, s. 167.

Chattels personal are strictly speaking, things Chattels  
movable, but in modern times the expression is used to personal.  
denote any kind of property other than real property  
and chattels real<sup>9</sup>. Fixtures are not chattels personal  
until severed from the land<sup>10</sup>. Leaseholds not being  
chattels personal are not "goods" within the meaning  
of the Act<sup>11</sup>. Bills of exchange, promissory notes, and  
money are *chattels personal*<sup>2</sup>. A ship is a chattel personal.

2 (t) "insolvent person" and "insolvent" in- "Insolvent  
clude a person, whether or not he has done person."  
or suffered an act of bankruptcy, (i) who is "Insolvent."  
for any reason unable to meet his obligations  
as they respectively become due, or (ii) who  
has ceased paying his current obligations in  
the ordinary course of business, or (iii) the  
aggregate of whose property is not, at a fair  
valuation, sufficient, or, if disposed of at a  
fairly conducted sale under legal process  
would not be sufficient, to enable payment of  
all his obligations, due and accruing due,  
thereout:

**Cross References Act:** Settlements avoided where settlor becomes insolvent 29(1); insolvent person may make authorized assignment 9; or composition 13(1); admission of insolvency is act of bankruptcy 3(f); insolvent person and fraudulent preference 31.

<sup>9</sup> Halsbury, Laws of England, vol. xxii., s. 786.

<sup>10</sup> *Elwes v. Mawe*, S. L. C. 8th ed., vol. 11, p. 169; and see *Chamberlayne v. Collins* (1894), 70 L. T. 217.

<sup>11</sup> *Richardson v. Webb* (1884), 1 Mor. 40.

<sup>2</sup> *In re Goetz, Jonas & Co. ex parte The Trustee* (1898), 1 Q. B. 787; 67 L. J. Q. B. 577; 5 Mans. 76; *Hornblower v. Proud*, 2 B. & Ald. 327; *In re Mill's Trusts* (1895), 2 Ch. 564.



**Sections  
2(u), 2(v)**

The definition here given removes some of the uncertainty of previous case law, which however will be found useful in cases on the border line and in matters affecting the rights of creditors which may arise under provincial acts, where *The Bankruptcy Act* is silent. See on section 2(t)(i) *Warnock v. Kloepper*<sup>4</sup>; *Sutherland v. Nixon*<sup>5</sup> and *Hersee v. White*<sup>6</sup>. Section 2(t)(iii), may be compared with the definition given by Spragge, V.C., in *Davidson v. Douglas*<sup>7</sup> followed in *Empire Sash and Door Co. v. Maranda*<sup>8</sup>; *Robinson v. McCauley*<sup>9</sup>; *Richards & Brown, Ltd. v. Leonoff*<sup>10</sup>. It is only an insolvent person who may make an authorized assignment or whose conveyance, transfer or charge may be impeached as a fraudulent preference<sup>1</sup>.

“Judge.”

2 (u) “judge” means a judge of the court which is by this Act invested with original jurisdiction in bankruptcy:

**Cross References Act:** As to courts 63; and judges 64.

**Cross References Rules:** Judge defined 2(1); all matters to be heard in chambers 4; judge to regulate sittings 63.

**Analogous Legislation:** English Act, 1914, Rule 3. Ontario Assignments and Preferences Act, 1914, c. 134, s. 2.

“Judgment.”  
“Execution.”  
“Attachment.”

2 (v) “judgment” or “execution” or “attachment” shall have operation as if by law the

<sup>4</sup> 14 O. R. 288; 15 O. A. R. 324; 18 S. C. R. 701.

<sup>5</sup> (1862) 21 U. C. Q. B. 629, 633.

<sup>6</sup> (1869) 29 U. C. Q. B. 232, 238, and see *Hart v. Allen* (1902), 40 N. S. R. 352. See where a debtor had not been able to pay taxes on real estate, some parcels of which had been sold for taxes, *Hodge v. McLean and Union Bank of Canada* (1919), 12 S. L. R. 298.

<sup>7</sup> (1868) 15 Gr. 347.

<sup>8</sup> (1911) 21 M. L. R. 605; 19 W. L. R. 78, where the previous cases are reviewed.

<sup>9</sup> (1913) 24 W. L. R. 617; 13 D. L. R. 437.

<sup>10</sup> (1915) 25 M. L. R. 548, and see *Dominion Bank v. Cowan* (1887), 14 O. R. 465, 466; *Bertrand v. Canadian Rubber Co.* (1897), 12 M. L. R. 27. Contrast *Rae v. McDonald* (1887), 13 O. R. 352, 357, and see *Wade v. Elliott* (1907), 11 O. W. R. 38; *Casserley v. Hughes* (1905), 5 O. W. R. 599; 6 O. W. R. 70. As to the onus in partnership cases where a return of *nulla bona* has been made against firm property, see *Empire Sash & Door Co. v. Maranda*, *supra*; *Bank of Montreal v. Black* (1894), 9 M. L. R. 439.

<sup>1</sup> See sections 9 and 31.



liability of married women thereon and thereunder were personal as well as proprietary: Sections  
2(w), 2(x)

**Cross References Act:** Effect of judgment against married woman carrying on trade 75; receiving orders not to be within provincial statutes with respect to judgments 11(4); receiving order and authorized assignments lose precedence to judgments 11(10); debtor 2(o).

As to whether every married woman against whom a judgment is obtained becomes by reason of 2(v), liable to be made a bankrupt, see notes to 2(o).

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2 (w) "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division which includes the locality of the debtor. "Local newspaper."

**Cross References Act:** Locality of a debtor 2(x); bankruptcy districts and divisions 64(5); publication 11(4)(5), 15(3); 61(5), 62(3), 77(3)(4).

This section was substituted for the previous one by section 4 of *The Bankruptcy Act Amendment Act, 1921*<sup>2</sup>. Publication in a local newspaper is not of such importance under the Act as is gazetting in the *Canada Gazette*. See sections 11(4)(5), 15(3), 61(5), 62(3), 77(3)(4). Consider, however, the effect of 11(14)(15).

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2 (x) "locality" of a debtor (whether a bankrupt, assignor or person who has proposed a composition, extension or arrangement to or with his creditors) means either the place within a bankruptcy division or district whereat the debtor has carried on business at any time during the six months immedi-

<sup>2</sup>The previous section read: 2(w) "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division wherein the debtor has resided or carried on business for the longest period during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment.



Section 2(x) .

ately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment, or where the greater portion of the property of such debtor is situate, or where the debtor resides:"

**Cross References Act:** Petition to be presented to court having jurisdiction in locality of debtor 4(4); proceedings not invalidated by being taken in wrong court 4(11); authorized assignment to be made to trustee with authority in the locality of the debtor 9; "province of the debtor's locality" 6(4); debtor is defined 2(o); bankruptcy districts and divisions 64(5).

This section was substituted for the previous one by section 3 of *The Bankruptcy Act Amendment Act, 1920*<sup>3</sup>. It will be noticed that any one of three places may be the "locality" of the debtor. The previous section mentioned only two.

What is  
carrying on  
business.

A clerk in a bank is carrying on business. He does not have to be a principal<sup>4</sup>. The words "residence" and "business" have no definite technical meaning. The object of the rule is that proceedings shall be taken in the natural forum of a debtor<sup>5</sup>. A company or firm carries on business where its administrative business is carried on<sup>6</sup>, and not where an agent carries on business on behalf of the firm<sup>7</sup>.

Partners.

*Semble*, where a partnership is insolvent and the partners are living in a "locality" other than that of the partnership, the assignment of the partnership assets should be made to a trustee with authority in

<sup>3</sup> The previous section read:—2. (x) "locality" of a debtor (whether a bankrupt, assignor or person who has proposed a composition, extension or arrangement to or with his creditors) means the place within a bankruptcy division or district whereat the debtor has carried on business for the longest period during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment, or where the greater portion of the property of such debtor is situate.

<sup>4</sup> *Ex parte Breull in re Bowie*, 1880, 16 Ch. D. 484; 50 L. J. Ch. 384; distinguish *Graham v. Lewis* (1888), 22 Q. B. D. 1; 58 L. J. Q. B. 117; and *In re Charles Bright* (1901), 18 T. L. R. 37, 38.

<sup>5</sup> *Ex parte Breull in re Bowie*, *supra*.

<sup>6</sup> *Le Tailleur v. The South Eastern Railway Co.* 1877, 3 C. P. D. 18; *In re Brown v. L. N. W. Ry. Co.* (1863), 4 B. & S. 326; *Ex parte and in re Sharpe*, 1879, W. N. 14.

<sup>7</sup> *Ex parte and in re Charles*, 1872, L. R. 13 Eq. 638; 41 L. J. Bank. 43.



the locality in which is the chief place of business of the partnership<sup>s</sup>. Sections  
2(y) to 2(aa)

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2 (y) "oath" includes affirmation and statutory "Oath." declaration:

**Analogous Legislation:** English Act, 1914, s. 167.

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2 (z) "ordinary resolution" means a resolution "Ordinary resolution." carried in manner provided by subsection fourteen of section forty-two of this Act:

**Cross References Act:** needed for transfer of proceedings 6(4); resolution means ordinary resolution 2(ff); special resolution defined 2(ii); compare 13(3), 15(1).

**Analogous Legislation:** English Act, 1914, s. 167.

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2 (aa) "person" includes a firm or partnership, "Person." an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representatives of a person, according to the law of that part of Canada to which the context extends.

**Cross References Act:** Corporation defined 2(k); limited partnerships 76; infants, married women, Indians, convicts and lunatics; see notes to 2(o).

This section was substituted for the previous one by section 5 of the *Bankruptcy Act Amendment Act*, 1921<sup>1</sup>. Corporation as defined in section 2(k) does not include incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies. The amendment made in 1921 raises the question whether "person" bears the same meaning

<sup>s</sup> *In re McKenzie* (1871), 31 U. C. Q. B. 1.

<sup>1</sup> The previous section read: 2(aa) "person" includes corporation and partnership.



Sections 2(bb) to 2(dd) throughout the Act. If so, the effect of the amendment is to prevent trust companies being appointed authorized trustees. See section 14. Person is defined in R. S. C. 1906, c. 1, s. 34(20).

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"Petition." 2 (bb) "petition" means petition in bankruptcy;

**Cross References Act:** Generally 4; dismissed 68.

**Cross References Rules:** Generally 74 to 84, 87 to 91.

**Cross References Forms:** Generally 2 to 13.

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"Prescribed." 2 (cc) "prescribed" means prescribed by General Rules within the meaning of this Act;

**Analogous Legislation:** English Act, 1914, s. 167.

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"Property." 2 (dd) "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property as above defined;

**Cross References Act:** Goods are defined 2(s); property vesting in the trustee 6(3), 10, 15(3); property divisible among creditors 25; vesting of property on annulment of adjudication 62(2); after-acquired property 58(4) (5) (d); and generally, see index.

**Analogous Legislation:** English Act, 1914, s. 167.

#### ANALYSIS OF NOTES.

Property generally.

Things in action.

Extra territorial operation of Bankruptcy Act.

Real or immovable property.

Personal or movable property.

Effect of acts which purport to pass property wheresoever situate.

Rule for trustee.



Law within the Empire.

Effect of English bankruptcy on real and personal property in Section 2(dd)  
Canada.

Effect of Canadian bankruptcy on property abroad.

All British Bankruptcy Courts are to be auxiliary to one another.

This section obtains its importance from section 25 <sup>Property generally.</sup> which defines what property of the bankrupt passes to the trustee. The word "property" as used in section 2(dd), is wide enough to include matters for which no suit can be brought, such as the pension of a retired Judge of a Crown Colony<sup>9</sup>. It will include the right to money standing to the credit of the debtor in a bank<sup>10</sup>, but not money paid into court to abide the event of an action then pending<sup>1</sup>. The property in bills deposited with a banker and properly discounted by him passes to his trustee in bankruptcy; but not if the bills were improperly discounted<sup>2</sup>. Property will include trade fixtures, which by the terms of the lease the bankrupt lessee may sever from the land at the conclusion of the term<sup>3</sup>. A publican's license, which in England is a personal license to the individual occupying the premises, does not pass to the trustee<sup>4</sup>.

The modern tendency is to use the phrase, choses <sup>Things in action.</sup> in action, as including all personal chattels that are not in possession, that is such as could not be the subject of larceny because they could not be seized<sup>5</sup>. The following are examples of things in action which pass to the trustee: the right of a lessee to be relieved

<sup>9</sup> *Ex parte and in re Huggins* (1882), 21 Ch. D. 85; 51 L. J. Ch. 935, and see as to the annual payment to members of parliament, *Hollinshead v. Hazleton* (1916), A. C. 428. Contrast the difference between an attaching order which does not transfer to the garnishor any property in the debt attached: *Rat Portage Lumber Co. v. Harty* (1917), 40 O. L. R. 322, and the effect of the making of a receiving order which vests the property of the debtor in the trustee. See section 6(3).

<sup>10</sup> Note that the trustee is entitled to be paid such money without production of the deposit receipt: *Bank of Montreal v. Little* (1870), 17 Gr. 313.

<sup>1</sup> *Ex parte Banner in re Keyworth* (1874), L. R. 9 Ch. 379; 30 L. T. N. S. 620, and see notes to section 2 (gg) "secured creditor," and to section 11(1).

<sup>2</sup> *Ex parte Frere in re Sykes* (1829), 1 Montague & McArthur 263.

<sup>3</sup> *In re Eslick ex parte Alexander* (1876), 4 Ch. D. 503.

<sup>4</sup> *Ex parte Royle in re Britnor* (1877), 46 L. J. Bank 85; 25 W. R. 560; and see *In re O'Brien* (1883), 11 Ir. L. R. 213.

<sup>5</sup> *Per Blackburn, L.J.*, in *Colonial Bank v. Whinney* (1886), 11 A. C. 426; 56 L. J. Ch 43; 55 L. T. 362; 34 W. R. 705; 3 Mor. 207; see also notes to section 25.



Section 2(dd) of a forfeiture of a lease<sup>6</sup>; shares in an incorporated company transferable only by deed<sup>7</sup>; an interest in shares which are already subject to a mortgage<sup>8</sup>; a debenture<sup>9</sup>; the share of a partner in partnership assets<sup>10</sup>; a policy of life insurance<sup>11</sup>; the right of an agent to be paid a commission on the sale of property where the sale was negotiated by the agent prior to the adjudication of bankruptcy, even though no money was payable to the agent unless and until the purchaser should carry through the contract and pay the money<sup>1</sup>. Where a testator gave his wife the right of possession and enjoyment of all his pictures during her life and subject as aforesaid bequeathed to his son all the pictures for his sole use and benefit, the interest of the son in the chattels being an executory bequest which created no present or vested interest, and which if the mother survived him would never come into operation, was a chose-in-action<sup>2</sup>. Rights of action which pass to the trustee are fully discussed in the notes to section 25.

The Act purports to deal with property "whether

<sup>6</sup> *Howard v. Fanshawe* (1895), 2 Ch. 589.

<sup>7</sup> *Colonial Bank v. Whinney* (1886), 11 A. C. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 Mor. 207; contrast *Ex parte Union Bank of Manchester, In re Jackson* (1871), L. R. 12 Eq. 354. In *Colonial Bank v. Whinney*, *supra*, the decision was on section 44(iii) of (1883) 46 & 47 Vic. c. 52, the "order and disposition" section.

<sup>8</sup> *Ex parte Barry re Fox* (1873), L. R. 17 Eq. 113; 43 L. J. Bank 18; 29 L. T. 620; 22 W. R. 205.

<sup>9</sup> *Ex parte Rensburg in re Pryce* (1877), L. R. 4 Ch. D. 685; 36 L. T. 117; 25 W. R. 432.

<sup>10</sup> *Ex parte Fletcher re Bainbridge* (1878), 8 Ch. D. 218; 47 L. J. Bank 70; 26 W. R. 439; 38 L. T. 229.

<sup>11</sup> *Ex parte Ibbetson in re Moore* (1878), 8 Ch. D. 519; 39 L. T. 1; 26 W. R. 843.

<sup>1</sup> *In re Byrne ex parte Henry* (1892), 67 L. T. 230; 9 Mor. 213. Note that where the bankrupt has not completed his portion of the contract, the trustee can complete the work and sue the party for whom the work is done: *In re Worthington ex parte Pathé Freres* (1914), 2 K. B. 299; 83 L. J. K. B. 885; 110 L. T. 43, 599; 58 Sol. J. 252; 21 Mans. 119; unless some personal qualification of the bankrupt is of the essence of the contract: *Drew v. Josolyne* (1887), 18 Q. B. D. 590; *Tooth v. Hallett* (1869), L. R. 4 Ch. 242; 38 L. J. Ch. 396; 20 L. T. 155; 17 W. R. 423; in which case if the bankrupt completes the contract as agent for the trustee the trustee can sue: *Whitmore v. Gilmour* (1845), 12 M. & W. 808; and see further as to contracts for personal services notes to section 25(b).

<sup>2</sup> *Ex parte Singleton in re Tritton* (1889), 61 L. T. 301; 6 Mor. 250.



situate in Canada or elsewhere," thus following the present English Act<sup>3</sup>. Prior to the English Act of 1883, there was no legislative attempt made to vest in the trustee the property of the bankrupt situate outside the British Empire<sup>4</sup>. Under these circumstances foreign courts, on whose decision in the last analysis the rights of the trustee largely depend, applied to the determination of the question as to what property outside the *forum* passes on bankruptcy, certain rules of private international law developed at a time when no legislature claimed to give extra-territorial effect to a bankruptcy which took place within its jurisdiction<sup>5</sup>. Those rules so developed may be summarized with respect to real and personal property as follows:

Section 2(dd)  
Extra-territorial operation of Bankruptcy Act.

Generally it was held throughout the civilized world that the involuntary or statutory conveyance to the trustee of the bankrupt did not give him a legal title to immovable property situate in the foreign jurisdiction<sup>6</sup>. In some cases it was held he got no title at all, as the statute was interpreted as not intending to operate beyond the territorial limits of the State which enacted it; in other cases it was held that as between trustee and bankrupt an equitable title had

Real or immovable property.

<sup>3</sup> The discussion which follows does not touch the question of the competence of the Dominion Parliament to pass legislation with extra-territorial effect.

<sup>4</sup> See *Callender, Sykes & Co. v. Colonial Secretary of Lagos* (1891), A. C. 460, where the English Legislation is reviewed. In the case of legislation by the Canadian Parliament as there are no dominions or colonies over which that Parliament may competently legislate, it is difficult to see what intermediate meaning could be given to cut down the generality of the words "or elsewhere." See also *Ex parte Blain re Savers* (1879), 12 Ch. D. 523; and *In re and ex parte Pearson* (1892), 2 Q. B. 263; 61 L. J. Q. B. 585; 9 Mor. 185; in view of which cases section 1(2) of the English Act (1914), 4 & 5 Geo. V. c. 59, was passed. See *Macdonald v. Georgian Bay Lumber Co.* (1878), 2 S. C. R. 364.

<sup>5</sup> See for a valuable review of Canadian decisions, Lafleur *Conflict of Laws, Theoret, Montreal*, 1898, c. 18.

<sup>6</sup> In England it has been held that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate. Story, *Conflict of Laws*, 8th edition (1883), s. 428, citing *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402; *Selkrig v. Davis*, 2 Rose, 291; 2 Dow 230; *Coffin v. Coffin*, 2 P. Wms. 290, 293; *Brodie v. Barry*, 2 V. & B. 130; *Birtwhistle v. Vardill*, 5 B. & C. 438; 2 Bell Com. 690.



**Section 2(dd)** been given which on compliance with local regulations could be turned into a legal title<sup>7</sup>.

Personal or  
movable  
property.

It is a clear proposition not only by the law of England, but by that of every civilized country in the world, that voluntary transfers of personal property follow the law of the person or domicile<sup>8</sup>. But with respect to the effect of involuntary transfers under bankruptcy laws of personal property there is difference of opinion.

It seems that in all jurisdictions, even in those of the United States<sup>9</sup>; the effect of a statutory conveyance to a trustee under a foreign bankruptcy, in the domicile of the debtor, will as between the bankrupt and the trustee, entitle the trustee to the property. In England, the title of the foreign trustee or syndic is recognized as a legal title sufficient to defeat attachments made after the title passed to the trustee<sup>10</sup>. In some continental countries the title is nearer the equi-

<sup>7</sup> See Story, Conflict of Laws, 8th edition, 1883, chap. X. Real Property, and sec. 428. Foote, Private International Jurisprudence, 3rd edition, 1904, pp. 227-230.

<sup>8</sup> See *per* Loughborough, L.J., in *Sill v. Worswick*, 1 H. Bl. 690; *Birtwhistle v. Vardill*, 5 B. & C. 438, 581.

<sup>9</sup> Story, S. C., secs. 420, 421.

<sup>10</sup> The English law with respect to involuntary transfers of personal property is stated thus by Story, Conflict of Laws, 8th ed., 1883, sec. 409.

1st. An assignment under the bankruptcy law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England (even though the English trustee was the first to discover the personality and to claim it: *In re Anderson* (1911), 1 K. B. 896; 80 L. J. K. B. 919; 18 Mans. 216).

2nd. That an attachment of such property by an English creditor after such bankruptcy with or without notice to him is invalid to overreach the assignment.

3rd. That in England the same doctrine holds under assignments by her own bankruptcy laws as to personal property and debts of the bankrupt in foreign countries.

4th. That upon principle all attachments made by foreign creditors after such assignment in a foreign country ought to be held invalid.

5th. That at all events a British creditor will not be permitted to hold the property acquired by a judgment under any attachment made in a foreign country after such attachment.

6th. That a foreign creditor not subject to British laws will be permitted to retain any such property acquired under any such judgment if the local laws (however incorrect on principle) confer on him an absolute title.

And see Foote, Private International Jurisprudence, pp. 318-331, 3rd edition, 1904.



valent of an equitable title<sup>11</sup>. Although it is difficult to get any clear line from the many cases in the United States the decisions there do not in the main follow the English Rule<sup>1</sup>. Section 2(dd)

Whether in view of the clear words of the English and Canadian Acts, effect will be given by courts outside the Empire to the intention so expressed remains to be seen. As the activities of traders become more and more international the convenience of a system which recognizes one *forum* for the transfer of title may be increasingly recognized. Effect can be given to such an intention, even though compliance with the formalities of local laws is insisted on. Certainly it seems that in countries which claim the right to transfer property wherever situate the title of a trustee in

Effect of Acts which purport to pass property wheresoever situate.

<sup>11</sup> The law in force in France and Holland may be stated as follows: 1. The law of the domicile may rightfully divest the debtor of the administration of his property and place it under the administration of assignees or syndics. 2. Debts of an inhabitant against a foreigner are deemed part of his movable property and have their locality in the place of domicile of the creditor; though a purchaser from a bankrupt in a foreign country of property there locally situate would be entitled to hold it against the assignee if, at the time he had no knowledge of any bankruptcy or of any intent to defraud creditors. See Story, Conflict of Laws, 7th edition, sec. 417; citing Merlin, Repertoire, Faillite et Banqueroute, secs. 2, 3, art. 10, p. 412.

<sup>1</sup> The conclusion of Story, S.C., secs. 410-421, is that in the United States statutable assignments as distinguished from voluntary assignments operate intra-territorially only where the conflict is between local creditors and the foreign assignee. Thus it has been held in Massachusetts, *Blake v. Williams* (1828), 6 Pick. (Mass.) 285, that an assignment by commissioners of bankruptcy in a foreign country does not operate a legal transfer of the bankrupt's property in the State as against a creditor of the bankrupt. It was even said in one case, *Remsden v. Holmes* (1822), 20 Johns N. Y. 229, at 267, that after a commission and assignment in England the bankrupt could not voluntarily make a confirmatory conveyance in aid of the commission, on the ground that with respect to his property he was to be treated as civilly dead. See observations of Story, S. C., sec. 418, on this case. It has been held in the United States that the title of the trustee under the national Bankruptcy Act does not extend to property in foreign countries: *Oakley v. Bennett*, 11 How (U.S.) 33; *Philps v. McDonald*, 16 Nat. Bank. Reg. 217; *Barnett v. Poole*, 23 Tex. 217, and under the respective state insolvency laws the trustee takes only such property as has its situs within the jurisdiction of the Court in which the proceedings are pending: *Betton v. Valentine*, 1 Curt. (U.S.) 168; *Security Trust Co. v. Dodd*, 173 U. S. 624; *Osborne v. Adams*, 18 Pick. (Mass.) 245, and even the title so acquired is subordinate to the claims of creditors in other jurisdictions who have seized the property under attachments: *The Watchman*, Ware. (U.S.) 232; *Felch v. Bugbee*, 48 Me. 9; *Beer v. Hooper*, 32 Miss. 246; *Dunlap v. Rogers*, 47 N. H. 281.



**Section 2(dd)** another country which claims the same right should be recognized.

**Rule for trustee.**

Until the law on this matter is established the only safe rule for the trustee in the case both of real and of personal property is to exercise diligence in all foreign jurisdictions in which he has reason to believe from the business, books and travels of the debtor, that the debtor has property; and by compliance with local laws to endeavour to perfect his title in those countries<sup>2</sup>. The trustee should not overlook the provisions of section 55(4) and (5) of the Act, under which he has the right to call on the debtor to perfect for him the title given by statute<sup>3</sup>.

**Law within the Empire.**

The situation within the Empire is on a different footing from that without it. The English, Scotch and Irish Bankruptcy Acts apply to all parts of the Empire; and the Parliaments of the various Dominions have passed Acts following the language of the English Act purporting to convey property wheresoever situate.

**Effect of English bankruptcy on real and personal property in Canada.**

First as to the effect of an English bankruptcy in Canada. The law on this subject has been most clearly expounded by the learned Chief Justice of the King's Bench of Manitoba, in a judgment covering all the authorities<sup>4</sup>. It was there laid down that:—

(1) An adjudication of bankruptcy by an English Court on a domiciled Englishman passed to the trustee all the property, real and personal, of the bankrupt situate in Canada;

<sup>2</sup> A distinction should be made between the effect of adjudications of bankruptcy in actually transferring title to property and their effect in giving the trustee a right by complying with the local law to establish a good title. See *In re Levy's Trusts* (1885), 30 Ch. D. 119; 54 L. J. Ch. 968; *Waite v. Bingley* (1882), 21 Ch. D. 674; 51 L. J. Ch. 651, and *Dulaney v. Merry & Son* (1901), 1 K. B. 536; 70 L. J. K. B. 377; 8 Mans. 152; *Ex parte Rogers in re Boustead*, 16 Ch. D. 665; *Callender, Sykes & Co. v. Colonial Secretary of Lagos* (1891), A. C. 460. See the provisions of sections 6(3), 11(4).

<sup>3</sup> The Court may direct a creditor who has obtained property of the debtor in a foreign jurisdiction to hand it over to the trustee: *Hunter v. Potts* (1791), 4 T. R. 182; *affd. sub nom. Phillips v. Hunter* (1795), 2 H. Bl. R. 402; *Roe v. Smith* (1868), 15 Gr. 344.

<sup>4</sup> *In re Eades Estate* (1917), 33 D. L. R. 335; 2 W. W. R. 65. See further *Powis v. Quebec Bank* (1893), 2 Q. R. (Q. B.) 566; *Canadian Lumbering and Timbering Co. v. Grant* (1887), 12 P. R. 301; and see notes to section 61(2) for the effect of a foreign discharge.



(2) That the same adjudication passed to the trustee all property, real and personal, acquired by the bankrupt after adjudication, and prior to discharge, whether acquired in Canada or England; Section 2(dd)

(3) That the adjudication would not pass property, real or personal, acquired by the bankrupt after he had lost his English domicil and acquired a Canadian domicil.

In connection with the third point it should be borne in mind that when the facts occurred on which this judgment was delivered: (a) the English Act (that of 1883), did not permit a petition to be presented unless the person was (1) domiciled in England, or (2) within a year before the presentation of the petition had ordinarily resided, or (3) had a dwelling house, or (4) place of business in England.

(b) There was no Canadian Bankruptcy Act in force. There was therefore no argument on the ground of reciprocal comity.

Secondly, as to the effect of a Canadian bankruptcy on real or personal property situate in England, or in other parts of the Empire, whose bankruptcy Acts purport to pass property, real and personal, wheresoever situate, it is suggested that courts of a country whose legislature purports to pass property in other countries cannot well refuse to apply a rule of comity which will give effect to the Canadian law, subject, of course, to the requirements of local laws with respect to technicalities of transfer<sup>5</sup>.

<sup>5</sup> See *In re Anderson* (1911), 1 K. B. 896; 80 L. J. K. B. 919; 18 Mans. 216; see under the law as it then existed *In re Levy's Trusts* (1885), 30 Ch. D. 119, 123, and see generally *Ex parte Blain in re Savers* (1879), 12 Ch. D. 522; *Cooke v. Vogeler Co.* (1901), A. C. 102; 70 L. J. Q. B. 181; 8 Mans. 113; *In re and ex parte Pearson* (1892), 2 Q. B. 263; 61 L. J. Q. B. 585; 9 Mor. 185; *In re and ex parte Crispin*, L. R. 8 Ch. 374; 42 L. J. Bank. 65; *In re Eades Estate* (1917), 33 D. L. R. 335; 2 W. W. R. 65. For a valuable discussion of the subject, see *Foreign Judgments and Jurisdiction*, vol. III., Piggott, 1910, Butterworth & Co. In some cases concurrent proceedings in the two jurisdictions may be a convenience. Thus where there were bankruptcy proceedings in England and Madras respecting the same firm the English Court sanctioned a scheme under which the proceedings in England and Madras should be continued concurrently and the assets pooled and distributed rateably amongst all the creditors whose proofs should be admitted in each jurisdiction: *In re MacFadyen & Co. ex parte Viziana-*

Effect of  
Canadian  
bankruptcy  
on property  
abroad.



**Sections  
2(ee), 2(ff)**

All British  
bankruptcy  
courts are to  
be auxiliary  
to one  
another.

Section 122 of the present English Bankruptcy Act (1914), 4 & 5 Geo. V., c. 59, should not be overlooked.

It reads:—

“The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.”

“Registrar.”

2 (ee) “registrar” includes any other officer who performs duties like to those of a registrar:

**Cross References Act:** Jurisdiction of 65; appointed by Chief Justice 64(4); to keep copies of Canada Gazette 11(5); fee for search 11(6); affidavit may be sworn before 11(12); to file receiving orders and authorized assignments 11(11); penalties for non-compliance 11(13); to give notice to trustee of application for discharge 58(2).

**Cross References Rules:** Defined 2(1); jurisdiction of 5; may adjourn to be heard by a judge 6; any registrar may act for any other 64; proceedings to be filed with 7(2); security given to registrar 21(2); orders to be settled by 20; penalty for officers refusing to act 66; appeal from registrar 67; approves deposit in lieu of bond 23.

**Analogous Legislation:** English Act, 1914, Rule 3.

See *In re X*, (1921) 1 C. B. R. 459 (Holmsted, R.).

“Resolution.”

2 (ff) “resolution” means ordinary resolution:

**Cross References Act:** Ordinary resolution defined 2(z), 42(14); special resolution defined 2(ii).

**Analogous Legislation:** English Act, 1914, s. 167.

*gram Mining Co.* (1908), 1 K. B. 675; 77 L. J. K. B. 319; 52 Sol. J. 226; 15 Mans. 28; and see *In re Artola Hermanos ex parte Andre Chale* (1890), 24 Q. B. D. 640; 59 L. J. Q. B. 254; 7 Mor. 80.



2 (gg) "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor; Section 2(gg)  
"Secured creditor."

**Cross References Act:** Rights of secured creditors saved 6(1), 10, but see 11(1) (10) (16); inspection and redemption of goods in pledge 22(2); right to dividends 46; right to vote 42(10) (11) (15) (16); proof by 42(10) (11) (16), 45(5); creditor defined 2(m); priority of claims 51; rights of landlord 52.

**Cross References Rules:** Creditor defined 2(l).

**Analogous Legislation:** English Act, 1914, s. 167; Ontario Assignments and Preferences Act, R. S. O. 1914, c. 131, s. 25(5).

#### ANALYSIS OF NOTES.

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Money paid into Court.  
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Assignment of future chattels.  
Assignment of future receipts and debts.  
Lien.  
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    General liens by agreement.  
    Rights under general lien.  
Equitable liens.  
Conditions on which liens attach.  
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Marshalling.  
"From the debtor."

The definition in this section obtains its importance from section 46, which prevents "secured creditors" from proving for the full amount of their debt without either valuing their security or surrendering it. If, therefore, a creditor holds security, but is not within the definition of a secured creditor given in Importance  
of the  
section.



Section 2(gg) section 2(gg), he may retain his security and prove for the full amount of his debt.

Cases outside the section.

The words in 2(gg) exclude a personal obligation to make a security effectual, as they exclude a personal obligation to give a security<sup>6</sup>, but the obligee may be a secured creditor if the transaction is such as to create a trust or charge<sup>7</sup>, as where there is in addition to the covenant to give a security an equitable deposit of title deeds<sup>8</sup>, or the deposit of an unendorsed bill by way of security<sup>9</sup>. A creditor who has obtained judgment for specific performance is not a secured creditor<sup>10</sup>, nor it has been said is a landlord by reason of his power of distress<sup>1</sup>, nor is an executor by reason of his right of retainer<sup>2</sup>, but a judgment creditor who redeems in foreclosure proceedings may become a secured creditor<sup>3</sup>.

Security must be on the property of the debtor.

It will be noted that in order to make the creditor a secured creditor, the mortgage charge or lien must be on the property of the debtor<sup>4</sup>. Therefore a creditor who holds no security on the property of the debtor, but whose debt is guaranteed by a third party or secured by a charge on the property of a third party is not a "secured creditor" within the Act; the principle being that a creditor is not allowed to prove against a bankrupt's estate and retain a security which, if given up, would go to augment the estate

<sup>6</sup> *Deering v. Bank of Ireland* (1887), 12 A. C. 20, 26.

<sup>7</sup> *Bank of Scotland v. MacLeod* (1914), A. C. 311; 83 L. J. P. C. 250; 110 L. T. 946.

<sup>8</sup> *Ex parte Holthausen in re Scheibler* (1874), L. R. 9 Ch. 722; 44 L. J. Bank. 26.

<sup>9</sup> *Ex parte Rhodes in re Dean* (1837), 2 Dea. 364. In this case there being no question of a fraudulent preference the bankrupt was ordered to endorse the bill for the secured creditor. Where the note is for a greater amount than the debt the title to the note passes to the trustee: *Ex parte Brown in re Salisbury* (1824), 1 G. & J. 407; and see as to formal acts only which require to be done: *Watkins v. Maule* (1820), 2 Jacob & Walker, 237, 243.

<sup>10</sup> *Ex parte Clarke in re Burr* (1892), W. N. 138.

<sup>1</sup> *Per Jessell, M.R.*, in *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, 257; 50 L. J. Ch. 544, and see section 52.

<sup>2</sup> *Lee v. Nuttall* (1879), 12 Ch. D. 61.

<sup>3</sup> *Scott v. Swanson* (1907), 39 S. C. R. 229; *Adams v. Kiers* (1919), 46 O. L. R. 113. Similarly a creditor whose personal claim became a claim *in rem* under a provincial assignments Act became a secured creditor: *Wyld v. Clarkson* (1886), 12 O. R. 589.

<sup>4</sup> Compare *Robinhood v. Maple Leaf* (1916), 26 M. L. R. 238.



against which he proves<sup>5</sup>. Thus a creditor who has a surety for the principal debt and also security for it on the estate of the principal debtor is not as regards the surety a "secured creditor", but may present a petition against the surety without giving credit for the security, for the surety is not entitled to the security until he pays the debt<sup>6</sup>. But it has been held that the acceptance by the bankrupt of a bill of exchange in the terms "accepted payable on delivery up of the bill of lading", has made the bank which held the bill of exchange and the bill of lading against advances to the consignor a secured creditor; for the substance of the transaction must be looked at, and in effect the security was on the property of the bankrupt and not on that of a third party<sup>7</sup>.

Obviously a mere written promise to pay on the part of the debtor, whether or not this promise is in the form of a bill of exchange accepted by the debtor, does not give the creditor any security on the property of the debtor<sup>8</sup>. It was at one time thought that the case might be different if, for example, a debtor pledged to a banker as security for a debt, bills of exchange on which other persons were liable in addition to the debtor. It was, however, held by the Court of Appeal in England, that endorsed bills of exchange on which third parties are liable, and which are held by the bank "pending discount", the bank having made advances upon them, were not securities to be valued. It was suggested that the test was whether the customer's endorsement was an endorsement without recourse or was a complete endorsement giving all the legal remedies of an endorsement. If a complete endorsement the law considers that although at one

<sup>5</sup> *Ex parte West Riding Union Banking Co. in re Turner* (1881), 19 Ch. D. 105, 112. The rule under some Provincial Assignments Acts was different; and see *Wylde v. Clarkson*, *supra*.

<sup>6</sup> *In re Hodges ex parte Matthews* (1896), 3 Mans. 329, and see *Ex parte and in re A Debtor* (1919), 4 H. B. R. 221.

<sup>7</sup> *Ex parte Brett in re Howe* (1871), L. R. 6 Ch. 838; 40 L. J. Bank. 54, and see further notes to sec. 46.

<sup>8</sup> *Ex parte Ashworth in re Hoare* (1874), L. R. 18 Eq. 705; 43 L. J. Bank. 143; it is immaterial that it is an accommodation bill: *Bell v. Ottawa Trust & Deposit Co.* (1897), 28 O. R. 519. But such bills of exchange should be set out in the creditor's proof; see Form 47, and see *Ex parte Kidd in re Ruthven* (1898), 5 Mans. 227.



Section 2(gg) time the bill might under certain circumstances have been property of the debtor, yet after such endorsement it is as if all the parties had joined in giving the banker their personal security for the debt<sup>9</sup>. But if a bill is endorsed to a bank for discount only, the customer not being overdrawn at the time, the property in the bill does not pass to the bank until discounted<sup>10</sup>.

Where the payee of a promissory note indorses it and hands over to the indorsee with it a collateral guarantee for the note by a third party, the indorsee on the payee's bankruptcy is not a secured creditor.<sup>11</sup>

Purchaser  
of property  
not a secured  
creditor.

The purchaser of property of the debtor is not a secured creditor; though a mortgagee would be. Similarly a vendor under a conditional sale agreement is not a secured creditor of the purchaser<sup>12</sup>. But a vendor in Quebec may be a secured creditor by reason of his right to demand the rescission of the sale of a moveable<sup>1</sup>.

Mortgage.

A person holding a mortgage on the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor is a secured creditor within this sub-section. Such a mortgage may be either legal or equitable, but where title deeds are in the possession of the bank for one purpose, a verbal assent on the part of the debtor that they may be held by the bank as security for his debt is not sufficient to take the case out of the Statute of Frauds and create an equitable mortgage<sup>2</sup>. If a mortgagee of land gains lawful possession of the land he is entitled as against the mortgagor and his trustee in bankruptcy to the crops on the mortgaged land<sup>3</sup>. The

<sup>9</sup> *Ex parte Schofield in re Firth* (1879), 12 Ch. D. 337; 48 L. J. Bank. 122.

<sup>10</sup> *Dawson v. Isle* (1906), 1 Ch. 633; 75 L. J. Ch. 338; and see *Buchanan v. Findlay* (1829), 9 B. & C. 738.

<sup>11</sup> *In re Hallett ex parte Cocks* (1894), 2 Q. B. 256; 63 L. J. Q. B. 676; 1 Mans. 83.

<sup>12</sup> See *In re Empire Traction Co., Ltd.* (1921), 1 C. B. R. 361 (Blain, M.C.).

<sup>1</sup> *In re Rosenzweig, Goldfield's Claim* (1921), 1 C. B. R. 385, 387; 56 D. L. R. 101 (Panneton, J.). This, it seems, is a "privilege" within section 2(gg). S.C.

<sup>2</sup> *Ex parte Broderick in re Beetham* (1887), 18 Q. B. D. 766; 56 L. J. Q. B. 635; 35 W. R. 613.

<sup>3</sup> *In re Gordon ex parte O. R.* (1899), 61 L. T. 299; 6 Mor. 150.



mortgage need not have been registered; for as the trustee stand in the shoes of the bankrupt he takes subject to unregistered mortgages or charges<sup>4</sup>, unless avoided by legislation similar to section 30. A judgment creditor who on foreclosure proceedings in the Master's office redeems and obtains an assignment of the mortgage becomes, after the taking of the new account and the confirmation of the Master's report, a mortgagee of the lands, not merely to secure the original mortgage debt, but also the judgment debt<sup>5</sup>.

A creditor may be secured by a charge on existing property or on property not yet acquired by the debtor. Section 2(gg)  
Charge on existing property.

Sequestration, which is a process available where the person against whom it is issued is in contempt for disobedience of the court, does not give the person issuing the writ any charge over the property seized so as to make him a secured creditor<sup>6</sup>, even after payment into court to the account of the sequestrator<sup>7</sup>, although *semble*, if the order is that after payment of the sequestrator's costs the balance of the fund be carried to the general credit of the action the sequestrator will be in the position of a secured creditor of the bankrupt<sup>8</sup>. Sequestration.

An attachment of goods to compel the appearance of the defendant does not make the plaintiff a secured creditor<sup>9</sup>. Attachment.

An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is, not to deal with it except in one way; Receiver.

<sup>4</sup> *John Macdonald & Co., Ltd. v. Tew* (1914), 32 O. L. R. 262; *Craig v. McKay et al.* (1906), 12 O. L. R. 121; *Kitching v. Hicks* (1884), 6 O. R. 739; *Robinson v. Cook* (1884), 6 O. R. 590; *Collver v. Shaw* (1873), 19 Gr. 599.

<sup>5</sup> *Scott v. Swanson* (1907), 39 S. C. R. 229; *Adams v. Kiers* (1919), 46 O. L. R. 113.

<sup>6</sup> *In re Hastings ex parte Brown* (1892), 61 L. J. Q. B. 654; 2 Mor. 234.

<sup>7</sup> *In re and ex parte Pollard* (1903), 2 K. B. 41; 72 L. J. K. B. 509; 10 Mans. 152.

<sup>8</sup> *In re and ex parte Pollard, supra*, per Romer, L.J., at p. 48.

<sup>9</sup> *Levy v. Lovell*, 14 Ch. D. 234; 49 L. J. Ch. 305; *Ex parte Sear in re Price* (1881), 17 Ch. D. 74.



Section 2(gg) that is to pay it to or to hold it for the execution creditor<sup>10</sup>.

Money paid  
into Court.

Where a defendant pays money into Court in satisfaction with a denial of liability, and before the hearing becomes bankrupt, the plaintiff is a secured creditor to the extent to which the claim in the action is admitted by the trustee in the defendant's bankruptcy<sup>1</sup>, and generally it has been said<sup>2</sup>, that where money is paid into court to abide the event it must be treated as a security if the decision is in his favour<sup>3</sup>. An order for payment into court, which otherwise might make a creditor a secured creditor, may fall within the period of the relation back of the title of the trustee and so be deprived of that effect unless the transaction comes within the protection of section 32<sup>4</sup>.

Charge on  
future pro-  
perty and  
license to  
seize.

An assignment or charge of future property may be invalid if it is too "vague" or too wide<sup>5</sup>. If the so-called charge is a mere license to seize future chattels, and not an actual assignment<sup>6</sup>, no interest will arise under the license to seize until the chattels come into existence and the power is exercised. One result of this is that if before the chattels come into existence the debtor is made bankrupt and obtains his discharge the creditor's license to seize, which was auxiliary to

<sup>10</sup> *In re Pearce ex parte O. R.* (1919), 1 K. B. 354; *In re Potts ex parte Taylor* (1893), 1 Q. B. 648; 62 L. J. Q. B. 392; 10 Mor. 52; *In re Dickenson ex parte Charrington*. (1889), 22 Q. B. D. 187; 58 L. J. Q. B. 1; 6 Mor. 1; *Levasseur v. Mason & Barry* (1901), 2 Q. B. 73, has been distinguished on the ground that in that case there was no question of an English bankruptcy; *In re Pearce ex parte O. R.*, *supra*, at 364. And see *In re Tillett ex parte Kingscote* (1889), 6 Mor. 70.

<sup>1</sup> *In re Gordon ex parte Navalchand* (1897), 2 Q. B. 516; 66 L. J. Q. B. 768; 46 W. R. 31; 4 Mans. 141.

<sup>2</sup> *Ex parte Trustee in re Ford* (1900), 2 Q. B. 211; 82 L. T. 625; 48 W. R. 688, *sub nom. ex parte MacLister*, 69 L. J. Q. B. 690; 7 Mans. 281.

<sup>3</sup> See also *Doctor v. People's Trust Co.* (1912), 18 B. C. R. 111; *Ex parte Banner in re Keyworth*, L. R. 9 Ch. 379; 43 L. J. K. B. 102; 30 L. T. 620; *Ex parte Bouchard in re Moojin*, 12 Ch. D. 26; 48 L. J. K. B. 105; *Tomlinson v. Hampson*, 38 Sol. J. 401, and compare *Butler v. Wearing* (1885), 17 Q. B. D. 182; 3 Mor. 5; see *In re Trehearne* (1890), 60 L. J. Q. B. 50; 7 Mor. 261; *Re Bagley* (1911), 1 K. B. 317; 80 L. J. K. B. 168; 18 Mans. 1; *Ex parte O. R. in re Webster* (1907), 1 K. B. 623; *Wood v. Dunn*, L. R. 6 Q. B. 73; 36 L. J. Q. B. 27, and see Sec. 11 (1).

<sup>4</sup> *In re Gershaw & Levy ex parte Cook & Richards* (1915), 2 K. B. 527; 84 L. J. K. B. 1668; 1 H. B. R. 146.

<sup>5</sup> *Tailby v. O. R.* (1888), 13 A. C. 523, 529; *In re D'Epineuil*, 20 Ch. D. 758; *In re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *In re Reis ex parte Clough* (1904), 2 K. B. 769, 783.

<sup>6</sup> An agreement to assign future chattels gives an equitable title only: *McAllister v. Forsyth* (1885), 12 S. C. R. 1.



the debt, falls with the debt, and the creditor is not a Section 2(gg) secured creditor<sup>1</sup>.

But where instead of a mere license to seize there is an actual assignment of future chattels creating an interest in them the result is different. It was at one time thought that *Collyer v. Isaacs*<sup>8</sup> laid down the proposition that no matter whether an assignment is in the form of a covenant to assign or of an actual assignment it amounts in the case of after-acquired property to no more than a covenant to assign, and therefore a covenant which would be released by the discharge of the bankrupt. It was, however, held by the Court of Appeal in *In re Lind, Industrials Finance v. Lind*<sup>9</sup>, that the right of the assignee is a higher right than the right to have specific performance of a contract, and that the assignment creates an equitable charge which arises immediately upon the property coming into existence<sup>10</sup>. It appears to follow that the creditor is a secured creditor<sup>1</sup>.

A trader cannot by any assignment or charge give a good title as against his trustee in bankruptcy to profits or receipts of his business accruing after the commencement of his bankruptcy<sup>2</sup> for this is an attempt to assign a debt which might become due to his trustee at a future time. Nothing being due to the trader at the date of the assignment he had nothing to assign; but if the money is due to the trader at the date of the assignment, even though payable in instalments at a future time, he can assign it as against the trustee<sup>3</sup>. Where one member of a partnership pur-

Assignment  
of future  
chattels.

Assignment  
of future  
receipts and  
debts.

<sup>1</sup> *Reeve v. Whitmore* (1863), 33 L. J. Ch. 63; *Thompson v. Cohen* (1872), L. R. 7 Q. B. 527; *Cole v. Kernott* (1872), L. R. 7 Q. B. 534n; *Collyer v. Isaacs* (1881), 19 Ch. D. 342.

<sup>8</sup> *Supra*.

<sup>9</sup> (1915), 2 Ch. 345.

<sup>10</sup> *Ibid*, 366; *Carr v. Allatt* (1858), 27 L. J. Ex. 385; *Brown v. Bateman* (1867), L. R. 2 C. P. 272; 36 L. J. C. P. 134; *Holroyd v. Marshall* (1861), 10 H. L. C. 191.

<sup>1</sup> As to the distinction between a specific and a floating charge see further, *Tailby v. O. R.* (1888), 13 A. C. 523, 526; *In re Yorkshire Woolcombers' Association* (1903), 2 Ch. 284; *National Provincial v. United Electric* (1916), 1 Ch. 132.

<sup>2</sup> *Ex parte Nichols in re Jones* (1883), 22 Ch. D. 782; 52 L. J. Ch. 635; *Wilmot v. Alton* (1897), 1 Q. B. 17; 66 L. J. Q. B. 42; 4 Man. 17.

<sup>3</sup> *In re Davis ex parte Rawlings* (1888), 22 Q. B. D. 193; *Ex parte Moss in re Toward* (1884), 14 Q. B. D. 310.



Section 2(gg) ported by deed to assign the book debts of the firm as security for a debt due by the firm, signing the deed in his individual name and also (without authority), in the name of his partner, it was held that whether or not the deed was valid as a deed it operated as a good equitable assignment<sup>4</sup>. *Semble*, the charge may be one which is to take effect on the happening of a contingency. Thus where a contract between a contractor and an urban council provided that if the council's engineer had reasonable cause to believe that the contractor was "unduly delaying payment" the engineer might direct payment out of the next certificate of sums due to certain manufacturers who had supplied the contractor with machinery, it was held that as the contractor could not withdraw this authority it was not annulled by bankruptcy; and that the presentation by the contractor of a bankruptcy petition was an undue delaying of proper payment sufficient to authorize the engineer to direct payment to the manufacturers<sup>5</sup>.

Lien.  
Specific  
liens.

Liens are either legal or equitable. Legal liens fall into two classes: specific and general. A specific lien is a lien attaching to certain property with respect to purchase money due therefor or for work and labour performed in connection therewith<sup>6</sup>. Many examples might be given of specific liens, liens for example for work and labour by a brickmaker working on the property of his employer<sup>7</sup>, or by woodmen working for contractors on timber limits<sup>8</sup>, or by a mechanic<sup>9</sup>, or by a carriage maker for repairs<sup>10</sup>. A person holding a lien is a secured creditor<sup>11</sup>.

<sup>4</sup> *In re Briggs ex parte Wright* (1906), 2 K. B. 209; 74 L. J. K. B. 591; 95 L. T. 61.

<sup>5</sup> *In re Wilkinson ex parte Fowler* (1905), 2 K. B. 713; 74 L. J. K. B. 969; 12 Mans. 377.

<sup>6</sup> *Dixon v. Yates*, 5 B. & A. 503; *Houlditch v. Milne*, 3 Esp. 86.

<sup>7</sup> *Roberts v. Bank of Toronto* (1894), 21 O. A. R. 629.

<sup>8</sup> *Good v. Nepisquit Lumber Co.* (1913), 11 D. L. R. 850.

<sup>9</sup> *In re Clinton Thresher Co.* (1910), 1 O. W. N. 445; the fact that the lien is registered subsequently to the making of the receiving order is immaterial if it has attached before that date; see *In re Empire Brewing and Malting Co.* (1891), 8 M. L. R. 424, and sec. 6(1).

<sup>10</sup> *Stewart v. Ledoux* (1875), 2 Rev. Crit. 482.

<sup>11</sup> *In re Rockland Chocolate and Cocoa Co., Ltd.* (1921), 1 C. B. R. 452 (Orde, J.).



A factor as distinguished from a broker has not only a specific lien on all goods in his possession while they remain in his possession; but he has also a general lien on the price of the article when the article is sold, and is in the hands of the buyer. He has, therefore, the power of giving a discharge or bringing an action or retaining the money, and his trustee in bankruptcy has the same rights<sup>1</sup>.

Section 2(gg)  
General  
liens.  
Factor's  
lien.

By the law merchant a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance<sup>2</sup>, unless any particular security has been received under special circumstances, which take it out of the general rule, as where boxes and contents have been deposited with bankers for safe custody only<sup>3</sup>, or where bills are received by bankers for the express purpose of being delivered to the customer<sup>4</sup>, or where a policy of life insurance is deposited with bankers accompanied by a memorandum of charge to secure overdrafts<sup>5</sup> not to exceed a specified amount<sup>5</sup>, or where securities known to the bank to belong to some other person have been deposited by a customer for a special purpose.<sup>6</sup>

Banker's  
lien.

A solicitor has not only a general lien<sup>7</sup>, but he has in addition an equitable lien on the proceeds of litigation for his costs in that litigation<sup>8</sup>.

Solicitor's  
lien.

A lien for a general balance may be established by agreement<sup>9</sup>. A common carrier is at common law entitled only to a lien for the carriage price of the particular goods; but he may establish a lien for his general balance by contract either express or implied<sup>10</sup>.

General  
liens by  
agreement.

<sup>1</sup> *Drinkwater v. Goodwin* (1775), 1 Cowp. 251; *Hudson v. Granger* (1821), 5 B. & Ald. 27.

<sup>2</sup> *Davis v. Bowsher* (1794), 5 T. R. 488.

<sup>3</sup> *Leese v. Martin* (1873), L. R. 17 Eq. 224.

<sup>4</sup> *Brandao v. Barnett* (1846), 12 Cl. & F. 787.

<sup>5</sup> *In re Bowes, Strathmore v. Vane* (1886), 33 Ch. D. 586; 35 W. R. 166; 55 L. T. 260; but see *In re London & Globe Finance Corporation* (1902), 2 Ch. 416.

<sup>6</sup> *Cuthbert v. Roberts* (1909), 2 Ch. 226; 78 L. J. Ch. 113, 529; 100 L. T. 62, 796; 53 Sol. J. 559.

<sup>7</sup> *Wilkins v. Carmichael* (1779), 1 Doug. (K.B.) 101, 104; *Cowell v. Simpson* (1809), 16 Ves. 275; *In re Boston Wood Rim Co.* (1905), 5 O. W. R. 149.

<sup>8</sup> *In re Cockrell's Trust* (1911), 2 Ch. 318.

<sup>9</sup> *Kirkman v. Shawcross* (1794), 6 T. R. 14.

<sup>10</sup> *Rushford v. Hadfield* (1806), 7 East. 224, and see *Great Eastern Railway v. Lord's Trustee*, 1909, A. C. 109; 78 L. J. K. B. 160; 100 L. T.



## Section 2(gg)

Rights under a  
general lien.

A usage for carriers to retain goods as a lien for a general balance of account between them and the consignees cannot affect the right of the consignor to stop the goods *in transitu*<sup>1</sup>.

Equitable  
liens.

A vendor has an equitable lien for unpaid purchase money on real estate<sup>2</sup>. Although the lien may be lost on a sale of the property under a sheriff's sale to a purchaser for value without notice, it has been held that it reattaches when the property comes back to the debtor<sup>3</sup>. The vendor's lien for unpaid purchase money extends also to personal property<sup>4</sup>, and interest is recoverable from the date on which the debt was incurred<sup>5</sup>. A purchaser has an equitable lien on the vendor's interest in the property agreed to be sold, for all sums paid by him under the contract on account of purchase money<sup>6</sup>.

Conditions  
on which  
liens attach.

Where possession of the property is a condition precedent to the existence of the lien, possession must be lawfully obtained, and under circumstances which permit the lien to attach. Thus where goods are delivered to a person who wrongfully claims them, and who pays freight and other charges, he has no lien on them for those expenses as against the rightful owner<sup>7</sup>. Similarly a solicitor to whom a mortgagee has delivered title deeds for safe keeping, has no lien on them for work done for the mortgagor<sup>8</sup>; and *semble*, a factor who has received goods of a debtor for sale after the

130; 16 Mans. 1, as to a lien for carriage of coal conferred by "ledger agreement."

<sup>1</sup> *Oppenheim v. Russell* (1802), 3 B. & P. 42, and see as to a contract which was designed to avoid this rule, *United States Steel Products Co. v. Great Western Railway Co.* (1916), 1 A. C. 189. See also as to the right to enforce a general lien against a pledgee and a surety, *Jowitt & Sons v. Union Cold Storage* (1913), 1 K. B. 1.

<sup>2</sup> *Kettlewell v. Watson* (1884), 26 Ch. D. 501.

<sup>3</sup> *Van Wagner v. Findlay* (1867), 14 Gr. 53.

<sup>4</sup> *Davies v. Thomas* (1900), 2 Ch. 462; 69 L. J. Ch. 643; 83 L. T. 11; *In re Stucley, Stucley v. Kekewich* (1906), 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718; 54 W. R. 256.

<sup>5</sup> *In re Stucley, Stucley v. Kekewich, supra.*

<sup>6</sup> *Westmacott v. Robins* (1864), 4 DeG. F. & J. 390; *Rose v. Watson* (1864), 10 H. L. C. 672; *Levy v. Stogdon* (1898), 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185.

<sup>7</sup> *Lempriere v. Pasley* (1788), 2 T. R. 485; *Madden v. Kempster* (1807), 1 Camp. 12.

<sup>8</sup> *Ex parte Fuller in re Long* (1881), 16 Ch. D. 617; 50 L. J. Ch. 448; 44 L. T. 63; 29 W. R. 448.



date to which the title of the trustee relates back, and Section 2(gg) who is not protected by section 32, has no lien for moneys advanced to the debtor<sup>9</sup>. Where a bill was sent by a debtor to merchants to be discounted, and the proceeds to be applied in a particular way, and the merchants did not discount the bill, but received the money when it became due, it was held that no lien was created by the original transaction and the merchants were liable to be sued by the assignees in bankruptcy of the debtor<sup>10</sup>; and similarly where bankers had the right to discount endorsed bills of exchange to an amount necessary to meet acceptances of their customers, and having received an endorsed bill of exchange, they refused the acceptances which it was designed to cover, and soon after stopped payment, and then discounted the bill, their trustee in bankruptcy was ordered to deliver up the bill<sup>1</sup>.

Where documents upon which a solicitor's lien exists are taken away without the consent of the solicitors, the lien is not lost<sup>2</sup>. A solicitor's lien on documents of title is not affected by reason of the fact that the claim in respect of which the lien existed was barred by *The Statute of Limitations*<sup>3</sup>, nor is a vendor's lien on personal estate subject to any statutory bar in England<sup>4</sup>.

An authorization to sell chattels against an account gives the shopkeeper a security on the deposited chattels where a bare authority to sell if executed gives no security but a set-off<sup>5</sup>.

Where a bankrupt had pledged stocks of his own with a bank to cover advances, and had at the same time wrongfully pledged with the bank for the same purpose stocks of one who was indebted to him, and

<sup>9</sup> *Copeland v. Stein* (1799), 8 T. R. 199. Where possession was taken under a document subsequently rescinded, see *Parker v. Lyon* (1888), 5 T. L. R. 10.

<sup>10</sup> *Buchanan v. Findlay* (1829), 9 B. & C. 738.

<sup>1</sup> *In re and ex parte Frere*, 1 Mont. and McA. 263.

<sup>2</sup> *In re Carter, Carter v. Carter* (1885), 55 L. J. Ch. 230.

<sup>3</sup> S. C.

<sup>4</sup> *In re Stucley, Stucley v. Kekewich* (1906), 1 Ch. 67; 75 L. J. Ch. 58.

<sup>5</sup> *In re Rose ex parte Hasluck* (1894), 1 Mans. 218.



Sections  
2(hh), 2(ii)

the bank on his bankruptcy sold the shares wrongfully pledged, the person whose stocks were so sold was held entitled by a process analogous to that of marshalling to have enough of the unsold pledged stocks of the bankrupt handed over to him to make up his loss<sup>6</sup>.

"From the debtor."

The words "from the debtor" were not in the English Act of 1869. They prevent a company which has a lien on all shares for moneys due the company, from being a secured creditor of a debtor who had obtained a judgment against a shareholder declaring that the shareholder was a trustee of his shares for the debtor. Though the lien is in one sense a security in their hands it is not such a security as makes them secured creditors<sup>7</sup>.

"Sheriff."

2 (hh) "sheriff" includes bailiff and any officer charged with the execution of a writ or other process:

**Cross References Act:** Sheriff to deliver property to trustee 11(3); an act of bankruptcy where goods are seized and sold by sheriff 3(e).

**Analogous Legislation:** English Act, 1914, s. 167.

See *Bellyse v. McGinn* (1891), 2 Q. B. 227; 6 L. T. 318; *Ex parte Warren* (1885), 15 Q. B. D. 48; 54 L. J. Q. B. 320; 2 Mor. 142.

"Special resolution."

2 (ii) "special resolution" means a resolution decided by a majority in number of the creditors present, personally or by proxy, at a meeting of creditors and voting three-fourths in value of the proved debts on the resolution:

**Cross References Act:** Ordinary resolution 2(z) (ff).

**Analogous Legislation:** English Act, 1914, s. 167.

<sup>6</sup> *In re Burge ex parte Skyrme* (1912), 1 K. B. 393; 81 L. J. K. B. 721; 20 Mans. 11.

<sup>7</sup> *In re Perkins ex parte Mexican Santa Barbara* (1890), 24 Q. B. D. 613; 59 L. J. Q. B. 226; 7 Mor. 32. This case is also put upon the ground that the company held no lien upon the shares as they were not bound to recognize trusts.



The Act nowhere requires the passing of a "special resolution" as a condition to action.

**Sections**  
**2(jj), 2(kk)**

2 (jj) "trustee" or "authorized trustee" means, dependent upon the context, (a) one of the persons appointed by the Governor in Council, under authority of this Act as proper persons to be trustees in bankruptcy or otherwise hereunder, or (b) one of such persons named in a receiving order or in an authorized assignment to act, or who is otherwise hereunder authorized to act, as a trustee in bankruptcy, or under an authorized assignment or in connection with a proposal by a debtor for a composition, extension or arrangement to or with his creditors:

**Cross References Act:** See generally 14 to 24. and in the Index; receiving order 6(1); authorized assignment 9.

**Cross References Rules:** Defined 2(1); discharge of trustee 107-110; and, see Index.

**Cross References Forms:** Forms for appointment or substitution of trustee 32 to 35; bond to registrar 36; application of trustee for his discharge 42, 43; order discharging trustee 44.

**Analogous Legislation:** English Act, 1914, s. 167.

Under the English Act of 1883, "trustee" did not include a trustee in composition proceedings for the purpose of examining the debtor under the equivalent of section 56<sup>s</sup>.

2 (kk) "wage-earner" means one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business:

**Cross References Act:** Part I. of the Act does not apply to wage-earners 8(1).

<sup>s</sup> *In re Grant ex parte Whinney* (1886), 17 Q. B. D. 238; 55 L. J. Q. B. 369; 3 Mor. 118.



## PART I.

## BANKRUPTCY AND RECEIVING ORDERS.

*Acts of Bankruptcy.*Section 3

3. A debtor commits an act of bankruptcy in each of the following cases:—

**Cross References Act:** Available act of bankruptcy 22(h), 4 (3) (b), 8(2); effect of notice of 32 (1) (d) (ii).

**Analogous Legislation:** English Act, 1914, s. 1(1).

Section 3 deals with “acts of bankruptcy,” those *indicia* of insolvency on which the English system of involuntary bankruptcy has long been founded.

The principal question for determination under our Act is whether an act of bankruptcy *as such* is a void, or a voidable, or a valid and unimpeachable transaction.

In England the solution of this question is simplified by the title of the trustee, which relates back to and avoids certain of the transactions which are acts of bankruptcy. Under our Act the relation back of the title of the trustee is much less extensive and affords no assistance in the determination of this matter<sup>1</sup>.

There is one further preliminary matter to dispose of in considering the respective positions in England and in Canada. *The English Bankruptcy Act* of 1914 is a codifying statute which follows on three hundred and seventy years of bankruptcy law. The Canadian Act of 1919 is a new law. In England there is what may be called a common law of bankruptcy which may or may not be resorted to. In Canada there is no common law of the Dominion; and while it is true that certain provinces have introduced or carried with them

<sup>1</sup> See as to the relation back of the title of the trustee, notes to section 4(10). In England the doctrine “once a bankrupt always a bankrupt” formerly existed; that is to say, that once a debtor had committed an act of bankruptcy he was prospectively and for all time deprived of his capacity to deal with his property; for the title of the assignees once appointed could relate back without limitation of time to the first act of bankruptcy. See Williams, *Bankruptcy Practice*, 12th edition, p. 202.



the English law of bankruptcy, that law has never been introduced into others, *e.g.*, Ontario and Quebec<sup>2</sup>. Section 3

If the eight acts of bankruptcy mentioned in section 3 are void transactions they would appear to be void without limitation of time; but the Act nowhere declares them to be void, and it is submitted that such a decision is unlikely. While there are expressions in some English cases on which such a decision might be rested<sup>3</sup>, the latest English case in the Court of Appeal is against such a construction, and the tendency appears to be to hold that the transaction is avoided by the relation back of the trustee's title<sup>4</sup>. Further the eight acts of bankruptcy in question are of two classes: those which are the result of some positive act of the debtor, as the making by him of a fraudulent conveyance or preference, and those in which the debtor is passive, as in the sale of the debtor's goods by the sheriff. It has been held that transactions of the second class, namely, those *in invitum*, are not void as between the parties, and that title can be made under them; nor are they interfered with by the relation back of the trustee's title<sup>5</sup>. As regards those of the first class certain of them are expressly avoided, either by force of the *Bankruptcy Act*, such as assignments for the general benefit of creditors other than authorized assignments<sup>6</sup>, and fraudulent preferences<sup>7</sup>, or by force of provincial law, such as fraudulent conveyances which fall under the provincial equivalent of 13 Eliz. c. 5. Among those of the first class which are not expressly avoided by the Act are authorized assignments, which are by section 3(a) made acts of bankruptcy.

If on the other hand all acts of bankruptcy other

<sup>2</sup> See Chapters II., III., IV., *supra*.

<sup>3</sup> See *per Mellish, L.J.*, in *In re Rogers ex parte Villars* (1874), L. R. 9 Ch. 432; 43 L. J. Bank. 76, 77.

<sup>4</sup> *In re Gunsbouurg (No. 3) ex parte Trustee* (1920), 89 L. J. K. B. 725; (1920), B. & C. R. 50; (1920), 2 K. B. 426; *per Cozens-Hardy, M.R.*, and Warrington, L.J., in *In re Halstead ex parte Richardson* (1917), 1 K. B. 695; 86 L. J. K. B. 621; (1917), H. B. R. 60, 68-9, 76; and see *In re Hirth ex parte O. R.* (1899), 1 Q. B. 612, 621; 68 L. J. Q. B. 287; 6 Mans. 10; *Johnson v. Osenton* (1869), L. R. 4 Ex. 107, 114, 115; *Siggers v. Evans* (1855), 5 E. & B. 367; *Allen v. Bonnett* (1870), L. R. 5 Ch. 577.

<sup>5</sup> *In re Rogers ex parte Villars* (1874), L. R. 9 Ch. 432; 43 L. J. Bank. 76.

<sup>6</sup> See section 9.

<sup>7</sup> See section 31.



**Section 3** than those *in invitum* are voidable, it follows that a fraudulent preference which is voidable for a period of three months under section 31 is voidable for a further period of three months, or six months in all under section 4(3)(b).

A somewhat similar point to the one now under discussion arose under the *Insolvent Act* of 1864 in the leading and much discussed case of *Thorne v. Torrance*<sup>8</sup>. It was there held that although there was no relation back of the trustee's title under the statute, still an assignment which was an act of bankruptcy and taken advantage of in due time was avoided by the issue of a writ of attachment<sup>9</sup>.

Acts of  
bankruptcy  
and sec. 32.  
Estoppel.

If the transaction which is itself an act of bankruptcy comes within section 32 of the Act it is protected<sup>3</sup>, but where there is not good faith there is no protection<sup>4</sup>.

A solicitor retained to sue a debtor has no authority to assent to the execution by the debtor of a deed of assignment, and if he does so assent the plaintiff is not precluded from commencing bankruptcy proceedings against the debtor alleging the deed of assignment as the act of bankruptcy<sup>5</sup>.

Act of  
bankruptcy  
revokes  
power of  
attorney.

A power of attorney is as a general rule revoked as against the trustee in bankruptcy by a subsequent act of bankruptcy in which an adjudication is made; but transactions under it may be protected if the purchaser had no notice of the act of bankruptcy<sup>6</sup>.

<sup>8</sup> (1866), 16 U. C. C. P. 445, 460; (1868), 18 U. C. C. P. 29, 31, followed in *Rose v. Brown* (1866), 16 U. C. C. P. 477; and see *Wilson v. Cramp* (1865), 11 Gr. 444.

<sup>9</sup> Section 32 would protect innocent parties under transactions avoided as acts of bankruptcy. It also applies to protect innocent parties against the relation back of the title of the trustee. See further as to the extent in England of the avoidance of a transaction amounting to an act of bankruptcy: *Stein v. Pope* (1902), 1 K. B. 595; 71 L. J. K. B. 322; 9 Mans. 125; *Carr v. Acraman*, 25 L. J. Ex. 90; *In re O'Sullivan ex parte Baller*, 61 L. J. Q. B. 228; *In re Johnson ex parte Wright*, 99 L. T. 305; 52 Sol. J. 622.

<sup>3</sup> *In re Sills, Shears v. Goddard* (1896), 1 Q. B. 406; 65 L. J. Q. B. 344; 3 Mans. 24; cf. *ex parte Gundry in re Sharp* (1900), 83 L. T. 416.

<sup>4</sup> *In re Jukes ex parte O. R.* (1902), 2 K. B. 58; 71 L. J. K. B. 710; 9 Mans. 249.

<sup>5</sup> *In re and ex parte Debtor* (No. 1 of 1914) (1914), 2 K. B. 758; 83 L. J. K. B. 1176; 21 Mans. 155, and see further notes to section 3(a).

<sup>6</sup> *Ex parte Snowball in re Douglas* (1872), L. R. 7 Ch. 534, 548.



As to intent generally in acts of bankruptcy, see *In re Wood*<sup>7</sup>. Section 3(a)  
Intent.

3 (a) If in Canada or elsewhere he makes an assignment of his property to a trustee or trustees for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not; Assignment.

**Cross References Act:** Authorized assignment 9; assignment of goods with intent to defraud creditors an act of bankruptcy 3(g); where the Court is satisfied that the estate can best be administered under the assignment it may dismiss the petition for a receiving order 4(6).

**Analogous Legislation:** English Act, 1914, s. 1(1) (a); Canadian Act, 1875, s. 3(j).

#### ANALYSIS OF NOTES.

The assignment must be on the whole of the property.

For the benefit of all creditors.

Whether the deed is an escrow or not.

"Or elsewhere."

Proof of intent unnecessary.

Certain assignments voidable in England are void in Canada.

As to validity of certain payments made under voidable assignment.

A creditor who consents cannot petition on the deed.

But he may on another act of bankruptcy.

Whether creditors party to the assignment can prove for debts.

Section 3(a) makes assignments under Provincial Acts, acts of bankruptcy. The question of Provincial Assignments is further discussed in section 9. A transaction which is not an act of bankruptcy within 3(a) may fall within the provisions of 3(g), as to assigning or being about to assign goods with intent to defraud creditors.

The assignment to come under 3(a) must be an assignment or conveyance<sup>8</sup> of substantially the whole of the debtor's property<sup>9</sup>. An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors is not an assignment for the general benefit The assignment must be of the whole of the property.

<sup>7</sup> (1872), L. R. 7 Ch. 302; 41 L. J. Bank. 21.

<sup>8</sup> Section 2(d).

<sup>9</sup> *In re Spackman ex parte Foley or May* (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 106; 7 Mor. 100; *Blain v. Peaker* (1889), 18 O. R. 109. An assignment of part of the debtor's property in trust to give the trustee uncontrolled management of the work of completing and selling partly finished houses was not even under section 9 of R. S. O. 1914, c. 134, an assignment for the general benefit of creditors: *Foster v. Trusts & Guarantee Co.* (1916), 25 O. L. R. 426.



Section 3(a) of creditors<sup>10</sup>. What is an assignment or conveyance must be construed with reference to the particular property to be dealt with, and by the light of the language and practice of conveyancers<sup>1</sup>.

For the benefit of all creditors.

The assignment to be an act of bankruptcy under section 3(a), must be for the benefit of the debtor's creditors generally, without regard to particular classes such as trade creditors<sup>2</sup>. Where the deed is for the benefit of certain named creditors only without any option for the others to assent or come in, it is not an assignment for the benefit of the creditors generally; but if the creditors are described by words such as "whose names and seals are hereunto subscribed", these words do not limit the deed to those in the schedule, but give a description under which any creditor is entitled to come in afterwards and sign<sup>3</sup>.

Whether the deed is an escrow or not.

There is an act of bankruptcy even when the assignment is expressed to be void provided certain creditors do not sign; or provided a commission of bankruptcy should issue<sup>4</sup>, or provided the trustee shall wish to avoid it<sup>5</sup>. Similarly if the assignment is executed with the intention that it operate at once, but only to be known to one or two, and only to be used if necessary, it is an act of bankruptcy<sup>6</sup>, but *semble*, if the deed is delivered as an escrow it will not amount to an act of bankruptcy<sup>7</sup>.

"Or elsewhere."

The words "or elsewhere" in this section seem to contemplate a conveyance intended to operate accord-

<sup>10</sup> *Archibald v. Hubble* (1890), 18 S. C. R. 116.

<sup>1</sup> *In re Hughes* (1893), 1 Q. B. 595; 62 L. J. Q. B. 358; 10 Mor. 91; and see *Ex parte Gundry in re Sharp* (1900), 83 L. T. 416, and *Bowler v. Burdekin* (1843), 11 M. & W. 128; and see on the meaning of "or elsewhere," *supra*.

<sup>2</sup> *Ex parte Barton in re Phillips* (1900), 2 Q. B. 329; *Sub nom. ex parte and in re Phillips* (1900), 69 L. J. Q. B. 604; 7 Mans. 277; and see *Matthews* (1886), 53 L. T. 872; *Hedges v. Preston* (1889), 80 L. T. 847; *Hadley v. Beedom* (1895), 1 Q. B. 646; 64 L. J. Q. B. 240; 2 Mans. 47; *In re Saumarez ex parte Salaman* (1907), 2 K. B. 170; 76 L. J. K. B. 828; 14 Mans. 170; *In re Allix* (1914), 2 K. B. 77; 83 L. J. K. B. 665; 21 Mans. 1.

<sup>3</sup> *General Furnishing & Upholstering Co. v. Venn*, 32 L. J. Ex. 220; *In re Saumarez ex parte Salaman*, *supra*; *In re Allix*, *supra*; *Canadian Bank of Commerce v. Davidson* (1910), 15 W. L. R. 530.

<sup>4</sup> *Dutton v. Morrison* (1809), 1 Rose, 213; 17 Ves. 193.

<sup>5</sup> *Taffenden v. Burgess* (1803), 4 East. 230.

<sup>6</sup> *Turner v. Hardcastle* (1862), 11 C. B. N. S. 683; 81 L. J. C. P. 193.

<sup>7</sup> *Bowler v. Burdekin* (1843), 11 M. & W. 128. See further on this point s. 9.



ing to Canadian law. *Semble*, conveyances not intended to operate according to Canadian Law are not within the section<sup>8</sup>. Section 3(a)

The corresponding sections of previous English Acts contained the words "with intent to defeat and delay creditors". Proof of intent was unnecessary under those Acts; nor is it required now<sup>9</sup>. Proof of intent unnecessary.

Apart from Statute there is nothing illegal in a debtor conveying all his property to a trustee for the benefit of his creditors<sup>1</sup>, although his doing so may be an act of bankruptcy<sup>2</sup>; but such an assignment may be a fraudulent preference, or void under the Statute of Elizabeth or such like provincial law; or subject to be impeached on the ground of actual fraud<sup>3</sup>. But section 9 avoids every assignment other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors<sup>4</sup>. In England as the title of the trustee relates back to the earliest act of bankruptcy committed within a period of three months prior to the presentation of the petition, such trans- Certain assignments voidable in England and Canada.

<sup>8</sup> *In re and ex parte Crispin* (1873), L. R. 8 Ch. 374, 380; 42 L. J. Bank. 65; 28 L. T. 483; 21 W. R. 491; see also *Dulaney v. Merry & Son* (1901), 1 K. B. 536; 70 L. J. K. B. 377; 84 L. T. 156; 49 W. R. 331; 8 Mans. 152; *Cooke v. Vogeler Co.* (1901), A. C. 102; 70 L. J. K. B. 181; 84 L. T. 10; 8 Mans. 113; *Ex parte Blain in re Sawers* (1879), 12 Ch. D. 522, 528. The same expression is used in secs. 2(dd), 3(b)(c). The wider statutory definition given to the word "debtor" since these cases were decided does not necessarily interfere with the rule laid down in *In re and ex parte Crispin*, although the other construction is possible.

<sup>9</sup> *In re Wood ex parte Luckes* (1872), L. R. 7 Ch. 302; 41 L. J. Bank. 21; 26 L. T. 113; *Ex parte Foley in re Spackman* (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 106; 38 W. R. 497; 62 L. T. 849; 7 Mor. 100.

<sup>1</sup> *Per Cleasby, B.*, in *Johnson v. Osenton* (1869), L. R. 4 Ex. 107, 115. See generally as to transactions which are acts of bankruptcy, notes to section 3.

<sup>2</sup> See also *Siggers v. Evans* (1855), 5 E. & B. 367; 24 L. J. Q. B. 305; and see *In re Hirth ex parte O. R.* (1899), 1 Q. B. 612, 621; 68 L. J. Q. B. 287; 47 W. R. 243; 80 L. T. 63; 6 Mans. 10; *Allen v. Bonnett* (1870), L. R. 5 Ch. 577; *Ex parte Games in re Bamford* (1879), 12 Ch. D. 314; 27 W. R. 744; 40 L. T. 789; and see as to title in such a case *Re Poppleton and Jones Contract* (1896), 74 L. T. 582.

<sup>3</sup> *Worsley v. De Mattos* (1758), 1 Burr. 467; *Ex parte and in re Milner* (1885), 15 Q. B. D. 605; 54 L. J. Q. B. 425; 53 L. T. 652; 33 W. R. 867; 2 Mor. 190; *Ex parte Chaplin in re Sinclair* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732; 51 L. T. 345; *Maskelyne v. Smith* (1903), 1 K. B. 671; 72 L. J. K. B. 237; 88 L. T. 148; 51 W. R. 372; 10 Mans. 121; and see notes to sections 3(b)(c).

<sup>4</sup> See as to law before section 9 was passed: *Wilson v. Cramp* (1865), 11 Gr. 444; *Thorne v. Torrance* (1867), 16 U. C. C. P. 445; 18 U. C. C. P. 29.



Section 3(a) actions though not void may be avoided<sup>5</sup>. In Canada, however, there is only a limited relation back to the title of the trustee<sup>6</sup>. This raises questions peculiar to our Act which must be considered separately.

(a) In the case of a receiving order founded on an assignment for the benefit of creditors, which is not an authorized assignment, but is avoided by section 9, the trustee under the assignment is acting under a void deed; and moreover certain of his transactions will be overreached by the relation back of the title of the trustee.

(b) Where the receiving order is founded on an authorized assignment it is unlikely that it will be held that the assignment is avoided as from its commencement merely because it was an act of bankruptcy. It is, however, quite possible that after the presentation of a petition a trustee under an authorized assignment should stay his hand until the decision of the Court has been given on the question of a receiving order; and that if he does not hold his hand he may find that within the period covered by the relation back of the title of the new trustee he is a trustee *de son tort*<sup>7</sup>.

In such case the effect of the relation back of the title of the new trustee on payments and other transactions of the old trustee will be important<sup>8</sup>. They are

As to validity of certain payments made under voidable assignment.

<sup>5</sup> *Ex parte Gundry in re Sharp* (1900), 83 L. T. 416.

<sup>6</sup> See sections 4(10), 6, 25, Rule 76.

<sup>7</sup> *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 92; 13 Mans. 344; *Thorne v. Torrance* (1866), 16 U. C. C. P. 445; (1868), 18 U. C. C. P. 29; *In re A. B. & Co.* (No. 2) (1900), 2 Q. B. 429; 69 L. J. Q. B. 568; 7 Mans. 268. It is considered that if a trustee accepts an authorized assignment after a petition has already been presented he may find himself in the position of a trustee *de son tort*. See *Croteau and Clark Co., Ltd.* (1920), 48 O. L. R. 359; 19 O. W. N. 199; where, however, this point was not argued. See notes to section 9.

An assignment by one partner of his separate estate may be avoided by subsequent proceedings in bankruptcy against the firm: *Wilson v. Stevenson* (1860), 12 Gr. 239; for where a firm is adjudicated bankrupt all the joint property of the bankrupts as well as the separate property of each of them vests in the trustee: Rule 94; *Ex parte Cook* (1728), 2 P. W. 500; *Hague v. Rolleston* (1768), 4 Burr. 2176; *In re Woddel's Contract* (1876), 2 Ch. D. 172; 45 L. J. Ch. 647. A deed of assignment which is void, because unstamped and unregistered, may be given in evidence as proof of an act of bankruptcy in England: *In re Hollingshead ex parte Heapy* (1888), 58 L. J. Q. B. 297; 6 Mor. 66.

<sup>8</sup> See for fuller discussion notes to section 4(10).



overreached by the title of the new trustee. Thus a Section 3(a) solicitor retained by a debtor to sell property and to apply the proceeds in payment of the solicitor's charges under the retainer cannot as against the relation back of the title of the trustee retain such proceeds in respect of charges occurring subsequently to knowledge by him of an available act of bankruptcy committed by the debtor<sup>9</sup>. Nor can a trustee under an assignment which may be avoided pay out of the assets the fees of solicitors in connection with the meeting of creditors and the deed of assignment<sup>10</sup>. On the same principle a creditor who takes over all the property of a debtor with the object of securing himself and paying other creditors, will on the deed being avoided be held not entitled to payment in full, out of the bankrupt's estate, of the sums which he had paid under the assignment; but may be allowed to prove for them in the bankruptcy<sup>1</sup>. Section 32 of the Act does not protect payments made not in the ordinary course of business for the purpose of doing that which the law constitutes an act of bankruptcy<sup>2</sup>, such as the taking over by a creditor of all the assets of a debtor with the view of distributing them among the creditors. Where under such a deed one of the creditors obtains a secret advantage in fraud of the general body of creditors, he may not even prove for his original debt, which by the terms of the deed he has released<sup>3</sup>.

Under the English Act a creditor who assents to or acquiesces in, or has recognized a trustee's title under an assignment, cannot set up the assignment as an act of bankruptcy<sup>4</sup>. But when one of joint petitioning

A creditor who consents cannot petition on the deed.

<sup>9</sup> *In re Spackman ex parte Foley* (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 106; 7 Mor. 100.

<sup>10</sup> *Ex parte Rawlings in re Forster* (1887), 4 Mor. 292.

<sup>1</sup> *Ex parte Chaplin in re Sinclair* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732.

<sup>2</sup> *Ex parte Gundry in re Sharp* (1900), 83 L. T. 416; see *in re Sills, Shears v. Goddard* (1896), 1 Q. B. 406; 65 L. J. Q. B. 344; 3 Mans. 24.

<sup>3</sup> *In re and ex parte Myers* (1908), 1 K. B. 941; 77 L. J. K. B. 386; 15 Mans. 85.

<sup>4</sup> *Ex parte Alsop* (1860), 29 L. J. Bank. 7; 1 DeG. F. & J. 289; *Ex parte and in re Stray* (1867), L. R. 2 Ch. 374; 36 L. J. Bank. 7; 16 L. T. 250; 15 W. R. 600; *Ex parte Taylor in re Brindley* (1906), 1 K. B. 377; 75 L. J. K. B. 211; 94 L. T. 116; 54 W. R. 301; 13 Mans. 1; *Ex parte Goas in re Clement* (1886), 3 Mor. 153 and see notes to 4(3).



**Section 3(a)** creditors is estopped from relying on the alleged act of bankruptcy the other may succeed<sup>5</sup>. Assent or acquiescence may be variously expressed or shown<sup>6</sup>. There is no assent where there is misrepresentation or fraud<sup>7</sup>, or if the deed is fraudulent against the assenting creditor, as where it gives an unknown advantage to another creditor or to the debtor<sup>8</sup>; but there may be assent, if there is no fraud, even when the deed does not bind the petitioning creditor<sup>9</sup>. Assent to a proposed deed is revocable by the creditor until the execution of the deed<sup>10</sup>.

But he may on another act of bankruptcy.

Whether creditors party to the assignment can prove for debts.

A creditor who is estopped from petitioning on an assignment may, where not bound by the deed, petition on an independent act of bankruptcy<sup>1</sup>.

It has been held that creditors who are otherwise bound by the deed and so prevented from founding petitions on it are not necessarily precluded from proving in bankruptcy proceedings brought by a creditor not a party to the deed. It is a question of intention as to whether the release was intended to be a release in any event. Generally it is not so; and the creditors

<sup>5</sup> *Ex parte Associated Newspapers Co. in re Jones Bros.* (1912), 3 K. B. 234; 81 L. J. K. B. 1178; 107 L. T. 236; 56 Sol. J. 751; 19 Mans. 349.

<sup>6</sup> *In re Beesley* (1913), 109 L. T. 910; *In re Day ex parte Hammond* (1902), 86 L. T. 238; *Ex parte and in re Michael* (1891), 8 Mor. 305; *In re Walker* (1910), 26 T. L. R. 260; *Ex parte Ridgway in re Hawley* (1897), 76 L. T. 501; 4 Mans. 41; *Ex parte and in re Woodroff* (1897), 76 L. T. 502; 4 Mans. 46; *Ex parte Collier in re Crow* (1907), 97 L. T. 140; 51 Sol. J. 593; 14 Mans. 279. A solicitor retained to sue a debtor has no authority to assent to the execution by the debtor of a deed of assignment: *In re A Debtor* (No. 1 of 1914) (1914), 2 K. B. 758; 83 L. J. K. B. 1176; 110 L. T. 944; 58 Sol. J. 416; 21 Mans. 155.

<sup>7</sup> *Ex parte Perrier in re Tanenberg* (1889), 37 W. R. 480; 60 L. T. 270; 6 Mor. 49; *Daughish v. Tennent* (1866), L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; 15 W. R. 196; *In re and ex parte Milner* (1885), 15 Q. B. D. 605; 54 L. J. Q. B. 425; 53 L. T. 652; 33 W. R. 867.

<sup>8</sup> *Ex parte Marshall*, 1 M. D. & D. 575; *Blacklock v. Dobie* (1876), 1 C. P. D. 265; *Ex parte Hallowell*, 3 M. & A. 538.

<sup>9</sup> *Ex parte Viney in re Adamson* (1894), 43 W. R. 192; 71 L. T. 579; 2 Mans. 153; and cf. *Ex parte Taylor in re Brindley*, *supra*.

<sup>10</sup> *Ex parte Associated Newspaper Co. in re Jones*, *supra*.

<sup>1</sup> *Ex parte and in re Mills* (1906), 1 K. B. 389; 75 L. J. K. B. 247; 94 L. T. 41; 54 W. R. 322; 13 Mans. 9; *Ex parte and in re Stray* (1867), L. R. 2 Ch. 374; 36 L. J. Bank. 7; 16 L. T. 250; 15 W. R. 600; *Ex parte and in re Sunderland* (1911), 2 K. B. 658; 80 L. J. K. B. 825; 105 L. T. 233; 55 Sol. J. 568; 18 Mans. 123; and see *Ex parte and in re Woodroff*, *supra*; *Ex parte Ridgway in re Hawley*, *supra*; and see notes to section 4(3).



can prove. It might be held to be otherwise if there Section 3(b) were obviously an intention to divide all the property among a small group of creditors<sup>2</sup>, or if there were a secret illegal bargain between the debtor and the creditor<sup>3</sup>.

3 (b) If in Canada or elsewhere he makes a Fraudulent conveyance. fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

**Cross References Act:** Property defined 2(dd); assignment of goods with intent to defraud, defeat or delay creditors is an act of bankruptcy 3(g); for meaning of "or elsewhere," see notes to section 3(a).

**Analogous Legislation:** English Act, 1914, s. 1 (1)(b). *Cf.* Canadian Act, 1875, s. 3(d).

ANALYSIS OF NOTES.

Fraudulent against creditors.

Distinguish 3(c) and 3(g).

Fraudulent conveyances of two classes.

First class: Cases contrary to general policy of the bankruptcy law.

Such transactions voidable only not void.

Meaning of fraudulent.

Protection of innocent transferee.

Intent inferred.

Sale of all debtor's property to a company.

Assignment for past debt and present or future advance.

Test to be applied in cases of an advance.

Insufficient equivalents.

Assignment of part only of debtor's property.

Second class of fraudulent conveyances:

(a) Provincial law on the lines of 13 Eliz. c. 5.

Cases within 13 Eliz. c. 5.

Instructions to jury.

Right of creditor to have deed set aside under 13 Eliz.

(b) Provisions of the Civil Code of Quebec.

(c) Other provincial enactments.

Criminal dispositions of property.

A fraudulent conveyance under the section means Fraudulent one fraudulent against creditors, not purchasers<sup>4</sup>. against creditors.

Cases arising under this section must be distin- Distinguish 3(c) and 3(g).

<sup>2</sup> *Ex parte O. R. in re Stephenson* (1888), 20 Q. B. D. 540; 57 L. J. Q. B. 451; 36 W. R. 624; 58 L. T. 589; 5 Mor. 44.

<sup>3</sup> *Ex parte Phillips in re Harvey* (1888), 36 W. R. 567; *Ex parte and in re Myers* (1908), 1 K. B. 941; 77 L. J. K. B. 386; 15 Mans. 85; *In re Cross* (1848), 4 DeG. & Sm. 364 n; *Ex parte Oliver in re Hodgson* (1848), 4 DeG. & S. 354; *Mayhew v. Boyes* (1909), 103 L. T. 1.

<sup>4</sup> *Ex parte Luckes in re Wood* (1872), L. R. 7 Ch. 302, 307; 41 L. J. Bank. 21.



**Section 3(b)** guished from those under 3(c), which have to do with fraudulent preferences. Under 3(b), the conveyance will generally (though not always) be of the whole of the property of the debtor; while under 3(c), the assignment is generally only of a part of his property. There may also be cases of a debtor disposing of his goods with intent to defraud his creditors which do not fall within 3(b), but which can be brought within 3(g).

Fraudulent conveyances of two classes.

Fraudulent conveyances may be of two classes:—

1. Those contrary to what has been called the general policy of the bankruptcy law, as expressed in this section<sup>5</sup>; and

2. Those which have been declared to be fraudulent by Provincial statute. Provincial law on this matter is, it is conceived, valid, so long at least as there is not repugnant Dominion legislation<sup>6</sup>. Such Provincial law may be the equivalent of 13 Eliz. c. 5; or articles 1032-1040 of the code in the Province of Quebec; or possibly unrepealed sections of Provincial Acts respecting voluntary assignments and preferences<sup>7</sup>.

First class cases contrary to general policy of the bankruptcy law.

The first class of cases under section 3(b), is that class of case which has been said to be contrary to the general policy of the bankruptcy law. The scope of section 3(b) and the effect of cases on it is indicated by its forbear: Jac. 1, c. 15, which reads:—

“if any trader shall make or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods or chattels to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts he shall be adjudged a bankrupt<sup>8</sup>.”

Such transactions voidable only, not void.

That Act did not, nor does the present Act expressly make such grant or conveyance void. It was, however,

<sup>5</sup> There may be some difficulty in determining the applicable principle. See chap. iv. *ante*. The Bankruptcy Act contains no general declaration of what are to be regarded as fraudulent conveyances. Compare section 29; and the section dealing with fraudulent preferences, section 31. See also as to possible provisions regarding companies, section 66(2).

<sup>6</sup> *The Voluntary Assignments Case; Attorney-General (Ont.) v. Attorney-General (Can.)* (1894), A. C. 189; 63 L. J. P. C. 59.

<sup>7</sup> See *Rickaby v. Bell* (1878), 2 S. C. R. 560; *per* Patterson, J., in *Edgar Central Bank* (1888), 15 O. A. R. 202; *Stevens v. McArthur* (1891), 19 S. C. R. 446, 457; *Thorne v. Torrance* (1866), 16 U. C. C. P. 445; 18 U. C. C. P. 29.

<sup>8</sup> See as to verbal changes in previous sections: *In re Wood ex parte Luckes* (1872), L. R. 7 Ch. 302; 41 L. J. Bank. 21; 26 L. T. 113; 20 W. R. 403.



avoided by the relation back of the title of the trustee. Section 3(b)  
 It is only by such relation back that the transaction is avoided in England<sup>9</sup>. The position under *The Bankruptcy Act* has yet to be decided. See notes to section 3 *supra*.

The word "fraudulent" in this sub-section has come to have a technical meaning. It does not necessarily contain the idea of a common law fraud, or of even moral fraud. The fraud meant is a fraud against creditors<sup>3</sup>; an attempt to evade the bankruptcy laws; such as the putting of the property of the debtor into a channel of distribution different from that contemplated by the Act<sup>4</sup>, or the sale to an execution creditor of property seized under execution when the debtor knew that he was insolvent<sup>5</sup>, or a scheme of successive unregistered bills of sale<sup>6</sup>, or where as a device to evade the bankruptcy laws a mortgagor and a mortgagee contract that the mortgagor shall be tenant to the mortgagee<sup>7</sup>, or an agreement that on the bankruptcy of the debtor the security of the creditor shall be increased<sup>8</sup>, or a contract that a man's property, or a portion of his property such as building materials<sup>9</sup>, shall remain his until his bankruptcy, and then

<sup>9</sup> *Per Wright, J.*, in *In re Slobodinsky ex parte Moore* (1903), 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 19 T. L. R. 616, 651; 10 Mans. 341; *Ex parte O. R. in re Hirth* (1899), 1 Q. B. 612; 68 L. J. Q. B. 287, 293; 80 L. T. 63; 47 W. R. 243; 15 T. L. R. 153; 6 Man. 10; *Ex parte Games in re Bamford* (1879), 12 Ch. D. 314, 325; 40 L. T. 789; and see notes to section 3, *supra*. Certain transactions may fall within the Criminal Code, see *infra* p. 110.

<sup>3</sup> *Siebert v. Spooner* (1836), 1 M. & W. 714.

<sup>4</sup> *In re and ex parte Cranston* (1892), 9 Mor. 160; *In re Sharp, Gundry & Johnston* (1900), 83 L. T. 416; *Ex parte Chaplin in re Sinclair* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732; 51 L. T. 345.

<sup>5</sup> *Ex parte Pearson in re Mortimer* (1873), L. R. 8 Ch. 667; 42 L. J. Bank. 44; 28 L. T. 796; 21 W. R. 688.

<sup>6</sup> *Ex parte Furber in re Pellew* (1877), 6 Ch. D. 181. Such a scheme may not invalidate the security as such when there is no bankruptcy law in force: *McAllister v. Forsyth* (1885), 12 S. C. R. 1, 14.

<sup>7</sup> *Ex parte Voisey in re Knight* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; *Ex parte Jackson in re Bowes* (1880), 14 Ch. D. 725; *Ex parte Williams in re Thompson* (1877), 7 Ch. D. 138; 47 L. J. Bank. 26; *In re Stockton Iron Furnace Co.* (1878), 10 Ch. D. 335; 48 L. J. Ch. 417.

<sup>8</sup> *Ex parte Mackay & Brown in re Jeavons* (1873), L. R. 8 Ch. 643; 42 L. J. Bank. 68; 28 L. T. 828; 21 W. R. 664.

<sup>9</sup> *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19, but distinguish *Brown v. Bateman* (1867), L. R. 2 C. P. 272; 36 L. J. C. P. 134; *In re Waugh ex parte Dickin* (1876), 4 Ch. D. 524; 46 L. J. Bank. 26.



Section 3(b) go to some one else<sup>10</sup>, or an assignment of so much of the debtor's property as will prevent him from carrying on trade in the usual manner<sup>1</sup>, or an assignment of the whole of a debtor's property to a particular creditor<sup>2</sup>.

Protection  
of innocent  
transferee.

Where the transferor has such a fraudulent intent and the transferee is innocent the latter will be protected under section 32<sup>3</sup>; but he will not be protected if he has knowledge of circumstances which should indicate an intent to evade the bankruptcy laws<sup>4</sup>.

Intent  
inferred.

In certain cases the intent is inferred, as where the natural result of the transaction is to defeat or delay creditors<sup>5</sup>. Such a case would be where the debtor assigned for a past debt all his property<sup>6</sup>; or substantially the whole of his property<sup>7</sup>, because the

<sup>10</sup> *Higinbotham v. Holme* (1811), 19 Ves. 88, dis. *Denny's Trustee: Denny v. Warr* (1918-19), B. & C. R. 139.

<sup>1</sup> *Ex parte Bailey in re Barrell* (1853), 17 Jur. 475; 3 DeG. M. & G. 534; 22 L. J. Bank. 45.

<sup>2</sup> *Worsley v. De Mattos* (1758), 1 Burr. 467; see as to a sale out of the usual course of business of all the stock-in-trade of a debtor, *Brooks v. Taylor* (1876), 26 U. C. C. P. 443; *Cook v. Caldecott* (1830), 1 Moo. & Mal. 522, and the purchase of land by a debtor in the name of his brother: *Müller v. McQuaig* (1901), 13 M. L. R. 220.

<sup>3</sup> *Shears v. Goddard* (1896), 1 Q. B. 406; 65 L. J. Q. B. 344; 74 L. T. 128; 44 W. R. 402; 3 Mans. 24; *Ex parte Waller in re Dunkley & Son* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 54 W. R. 171; 12 Mans. 384; and see *In re Badham ex parte Palmer* (1893), 69 L. T. 356; 10 Mor. 252.

<sup>4</sup> *In re Jukes ex parte O. R.* (1902), 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Mans. 249; *Munro v. Standard Bank of Canada* (1913), 30 O. L. R. 12; *In re Sharp ex parte Gundry & Johnston* (1900), 83 L. T. 416.

<sup>5</sup> *Per* Horridge, J., in *In re David & Adlard or Johnson ex parte Whinney* (1914), 2 K. B. 694; 83 L. J. K. B. 1173; 110 L. T. 942; 21 Mans. 148; *In re Wood ex parte Luckes* (1872), L. R. 7 Ch. 302, 306; 41 L. J. Bank. 21; *Harrison v. Cohen* (1875), 32 L. T. 717.

<sup>6</sup> *Ex parte Foxley in re Nurse* (1868), L. R. 3 Ch. 515; 16 W. R. 831; 18 L. T. 862; *Ex parte Burton in re Tunstall* (1879), 13 Ch. D. 102; 41 L. T. 571; 21 W. R. 268; *Ex parte and in re Ellis* (1876), 2 Ch. D. 797; 45 L. J. Bank. 159; 34 L. T. 705; *Ex parte Luckes in re Wood* (1872), L. R. 7 Ch. 302; 41 L. J. Bank. 21; 26 L. T. 113; 20 W. R. 403; *Ex parte Boon in re Boon* (1879), 41 L. T. 42; *Bittleston v. Cook* (1856), 25 L. J. Q. B. 281; *Lomax v. Buxton* (1870), L. R. 6 C. P. 107; 40 L. J. C. P. 150; 24 L. T. 137; 19 W. R. 441; *Ex parte Snowball in re Douglas* (1872), L. R. 7 Ch. 534; 41 L. J. Bank. 49; 26 L. T. 894; 20 W. R. 786; distinguish the case of permission given to a lienholder to sell what afterwards turned out was the whole of the property of the debtor: *Philps v. Hornstedt* (1872), L. R. 8 Ex. 26; 42 L. J. Ex. 12.

<sup>7</sup> *Ex parte Barton in re Phillips* (1900), 2 Q. B. 329; 69 L. J. Q. B. 604; 82 L. T. 691; 49 W. R. 16; 7 Mans. 277; *In re Rayment ex parte*



result must inevitably be to defeat and delay creditors<sup>8</sup>, Section 3(b) unless indeed the assignment is the carrying out of a contract previously made where valuable consideration passed, the giving of the bill of sale or other security not being purposely postponed until the circumstances of the debtor become hopeless<sup>9</sup>.

Similarly where there is a sale by a debtor of all his assets to a company with the result that the creditors are defeated or delayed, intent is in some cases inferred<sup>10</sup>. A sale of the whole of the debtor's property is not necessarily an act of bankruptcy<sup>1</sup>, but the consideration obtained by the debtor must be available for the creditors<sup>2</sup>, though the consideration need not be of the full value of the property<sup>3</sup>. The same principle applies to mortgages of the property of the debtor<sup>4</sup>, for the advance even of a small portion of

Sale of all debtor's property to a company.

*Parkes* (1899), 80 L. T. 807; 6 Mans. 288; *Ex parte Foxley in re Nurse* (1868), L. R. 3 Ch. 515; 18 L. T. 862; 16 W. R. 831; *Ex parte Burton in re Tunstall* (1879), 13 Ch. D. 102; 41 L. T. 571; 21 W. R. 268; *Hale v. Allnutt* (1856), 25 L. J. C. P. 267; *Ex parte Trevor in re Burghardt* (1875), 1 Ch. D. 297; 45 L. J. Bank. 27; 33 L. T. 765; 24 W. R. 301; *Ex parte Hawker in re Keely* (1872), L. R. 7 Ch. 214; 41 L. J. Bank. 34; 26 L. T. 54; 20 W. R. 322; *Smith v. Cannan* (1853), 22 L. J. Q. B. 290; 2 E. & B. 35.

<sup>8</sup> *Mercer v. Peterson* (1868), L. R. 3 Ex. 104; 37 L. J. Ex. 54.

<sup>9</sup> *Mercer v. Peterson* (1868), L. R. 3 Ex. 104; 37 L. J. Ex. 54; *In re Jackson & Bassford, Ltd.* (1906), 2 Ch. 467; 75 L. J. Ch. 697; 13 Mans. 306; *In re Ash ex parte Fisher* (1872), L. R. 7 Ch. 636; 41 L. J. Bank. 62; 26 L. T. 931; 20 W. R. 849; *Jones v. Harber* (1870), L. R. 6 Q. B. 77; *Ex parte Kilner in re Barker* (1879), 13 Ch. D. 245; 41 L. T. 520; *Harris v. Rickett* (1859), 28 L. J. Ex. 197; 4 H. & N. 1. See as to a promise to give security, *Foster v. Russell* (1886), 12 O. R. 136.

<sup>10</sup> *In re David & Johnson or Adlard ex parte Whinney* (1914), 2 K. B. 694; 83 L. J. K. B. 1173; 110 L. T. 942; 58 Sol. J. 340; 21 Mans. 148; and see *Ex parte Moore in re Slobodinsky* (1903), 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 10 Mans. 341; *Ex parte O. R. in re Hirth* (1899), 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 463; 47 W. R. 243; 6 Mans. 10; *In re Wheatley's Trustee* (1901), 85 L. T. 491, and distinguish *In re Harris ex parte Trustee* (1906), 54 W. R. 460; 14 Mans. 127; *Rielle v. Reid* (1899), 26 O. A. R. 54. See as to a sale of part of the assets, *in re Gunsbourg ex parte Trustee No. 2* (1918-19), B. & C. R. 108; *In re Herman* (1915), H. B. R. 41, and see as to sale fraudulent under 13 Eliz. c. 5, *Gonville's Trustee v. Patent Caramel Co.* (1912), 1 K. B. 599; 81 L. J. K. B. 291; 19 Mans. 37.

<sup>1</sup> *Baxter v. Pritchard* (1834), 1 A. & E. 456; *Rose v. Haycock* (1827), 1 A. & E. 460; *In re Colemere* (1865), L. R. 1 Ch. 128, 133; 35 L. J. Bank. 8; 13 L. T. R. 21.

<sup>2</sup> See *In re David & Johnson or Adlard ex parte Whinney*, *supra*; *Smith v. Cannan* (1853), 22 L. J. Q. B. 290; 2 E. & B. 35.

<sup>3</sup> *Pennell v. Reynolds* (1861), 11 C. B. N. S. 709; 5 L. T. 286.

<sup>4</sup> *Bittlestone v. Cooke* (1856), 6 E. & B. 296; 25 L. J. Q. B. 281.



Section 3(b) the value of the property pledged may be of more advantage to the trader and his creditors than the property itself<sup>5</sup>. The advance is also looked upon as the equivalent of a substantial exception reserved for the debtor from the property assigned such as might enable him to carry on his trade with advantage<sup>6</sup>.

Assignment  
for past  
debt and  
present or  
future ad-  
vance.

Following the same line of reasoning it is now established that an assignment of all the property of a debtor for a past debt, and a present or future advance, is not as a conclusion of law and without proof of an intent to evade the bankruptcy laws a fraudulent conveyance<sup>7</sup>, and this is so even though the promise to make further advances does not appear in the deed, if there be an actual promise and if the advance is in fact made<sup>8</sup>. But the transaction will not be protected by the mere fact that advances were made, even if they were in the contemplation of the parties at the time<sup>9</sup>, where the grantor did not choose to bind himself in any way to make them<sup>10</sup>.

Test to be  
applied in  
cases of  
an advance.

As to the greatness or smallness of the advance it was first held that the advance should be a fair equivalent of the property transferred<sup>1</sup>, and that the smallness of the advance would be strong evidence that the advance was made not to enable the debtor to continue his trade, but to secure the past debt<sup>2</sup>. But in *Ex parte and in re King*<sup>3</sup>, it was said that whether or not the further advance is intended to give colour to a security made for the purpose of securing a pre-existing debt, is a question of fact; and this suggests the

<sup>5</sup> *Bittlestone v. Cooke*, *supra*.

<sup>6</sup> *Lomax v. Buxton* (1871), L. R. 6 C. P. 107; 40 L. J. C. P. 150; *Ex parte and in re Ellis* (1876), L. R. 2 Ch. D. 797.

<sup>7</sup> *Mercer v. Peterson* (1868), L. R. 3 Ex. 104; 37 L. J. Ex. 54. *The Thames* (1890), 63 L. T. 353.

<sup>8</sup> *Ex parte Sheen in re Winstanley* (1876), 1 Ch. D. 290. 560; 45 L. J. Bank. 14, 89. Contrast *Ex parte Chaplin in re Sinclair* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732.

<sup>9</sup> *Ex parte Dann in re Parker* (1881), 17 Ch. D. 26; 51 L. J. Ch. 290; *Lindon v. Sharp* (1843), 6 M. & G. 895.

<sup>10</sup> *Ex parte Dann in re Parker supra*; *Ex parte Wilkinson in re Berry* (1882), 22 Ch. D. 788; 52 L. J. Ch. 657.

<sup>1</sup> *Mercer v. Peterson* (1868), L. R. 3 Ex. 104; 37 L. J. Ex. 54.

<sup>2</sup> *Ex parte Fisher in re Ash* (1872), L. R. 7 Ch. 636; 41 L. J. Bank. 62.

<sup>3</sup> (1876), 2 Ch. D. 256.



present rule, which, while taking into consideration Section 3(b) the greatness or smallness of the advance, does not consider that to be the real test. The real test is said to be: Did the lender intend that the advance should enable the debtor to carry on his business, and had he a reasonable ground for believing that it would enable him to do so<sup>4</sup>.

The general rule being that an assignment of all the property of a debtor for a past debt is an act of bankruptcy, there is not a sufficient equivalent to take the case out of this rule, when all that the creditor does is to give the debtor time, or to refrain from proceeding with an execution<sup>5</sup>, or a seizure under an expiring bill of sale<sup>6</sup>, or to give him a secret verbal promise to pay certain debts of the debtor, where that promise is contradicted by the terms of the deed<sup>7</sup>. But there may be a sufficient equivalent if in addition to the past debt there is a further supply of goods on credit to enable the debtor to carry on business<sup>8</sup>, or a release of goods stopped *in transitu*<sup>9</sup>, or the assumption of the debtor's liability on trade bills<sup>10</sup>.

Where there is a conveyance of a part only as distinguished from the whole or substantially the whole of a debtor's property to secure a past debt there is no presumption of law or fact that such an act is a fraudulent conveyance<sup>1</sup>, but fraud in the sense in which this has already been defined must be proved<sup>2</sup>, and it must be shown that the grantee was a party to the

<sup>4</sup> *Ex parte Johnson in re Chapman* (1884), 26 Ch. D. 338; 53 L. J. Ch. 762; *Administrator General of Jamaica v. Lascelles* (1894), A. C. 135; 1 Mans. 163; *ex parte and in re Ellis* (1876), 2 Ch. D. 797; *Ross v. Dunn* (1889), 16 O. A. R. 552; *Risk v. Sleeman* (1874), 21 Grant 250; *Kalus v. Hergert* (1876), 1 O. A. R. 75.

<sup>5</sup> *Woodhouse v. Murray* (1868), L. R. 4 Q. B. 27; *Ex parte Cooper in re Baum* (1878), 10 Ch. D. 313; 48 L. J. Bank. 54.

<sup>6</sup> *Ex parte Payne in re Cross* (1879), 11 Ch. D. 539.

<sup>7</sup> *Ex parte Chaplin in re Sinclair* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732.

<sup>8</sup> *Ex parte Sheen in re Winstanley* (1876), 1 Ch. D. 560; 45 L. J. Bank. 89.

<sup>9</sup> *Ex parte Threfall in re Williamson* (1876), 46 L. J. Bank. 8; 35 L. T. 675.

<sup>10</sup> *Ex parte Reed in re Tweddell* (1872), L. R. 14 Eq. 586.

<sup>1</sup> It may be a fraudulent preference. See notes to section 3(c).

<sup>2</sup> See *Ex parte Pearson in re Mortimer* (1873), L. R. 8 Ch. 667; 42 L. J. Bank. 44; 28 L. T. 796; 21 W. R. 688.



**Section 3(b)** fraud<sup>3</sup>; though this is an inference of fact to be drawn from all the circumstances of the case<sup>4</sup>.

**Second class  
of fraudulent  
conveyances.**

A discussion of the second class of cases of fraudulent conveyances, so far as they fall within the operation of Provincial laws, is outside the scope of this work. Such cases will fall mainly within the three divisions of:—

- (a) Provincial law on the lines of 13 Eliz. c. 5.
- (b) Provisions of the Civil Code of the Province of Quebec respecting the avoidance of contracts and payments made in fraud of creditors.
- (c) Other specific Provincial enactments with respect to fraudulent conveyances.

(a) Provincial law on the lines of 13 Eliz. c. 5, is to be found in all the Provinces of Canada, except Quebec<sup>5</sup>. 13 Eliz. c. 5, reads in part:—

“For the avoiding . . . of feigned, covinous and fraudulent . . . gifts, grants . . . conveyances . . . and executions as well of lands and tenements as of goods and chattels . . . : which . . . gifts, grants . . . conveyances . . . and executions . . . are . . . to the . . . intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, . . . and reliefs . . . Be it therefore . . . enacted . . . that all and every . . . grant, gift . . . and conveyance of lands, tenements, hereditaments, goods and chattels or any of them or any lease, rent, common or other profit out of the same . . . and all and every . . . bond, suit, judgment, and execution . . . that . . . is . . . made to or for any intent or pur-

<sup>3</sup> *Ex parte* and *in re Cranston* (1892), 9 Mor. 160; and see *Ex parte Furber in re Pellew* (1877), 6 Ch. D. 192; *In re Gunsbourg ex parte Trustee No. 2* (1918-19), B. & C. R. 108.

<sup>4</sup> *Lee v. Hart*, 25 L. J. Ex. 135; 11 Ex. 880; *In re Herman* (1915), H. B. R. 41.

<sup>5</sup> See the following Statutes: Ontario, R. S. O. 1914, c. 105; Manitoba, R. S. M. 1913, c. 74; British Columbia, R. S. B. C. 1911, c. 93.

In Nova Scotia, New Brunswick and Prince Edward Island it is considered that 13 Eliz. c. 5 is part of the statute law taken with them by the settlers at the time of settlement. See Lefroy, *Constitutional Law of Canada*, p. 52, ed. 1918. As to Alberta, Saskatchewan and North-West Territories, see: *The North-West Territories Act*, R. S. C. 1887, c. 50, s. 11, which introduces the Laws of England in civil and criminal matters as of July 15th, 1870. In the Yukon the same law is applicable, see *Yukon Territory Act*, 61 Vic. c. 6.



pose before declared and expressed, shall be . . . Section 3(b)  
 deemed . . . only as against that person . . . his  
 heirs . . . and assigns . . . whose actions, suits, debts,  
 accounts, damages . . . and reliefs . . . are . . . dis-  
 turbed, hindered, delayed or defrauded to be clearly  
 and utterly void, frustrate and of none effect. . . .  
 Provided . . . that this Act . . . shall not extend to  
 any estate or interest in lands . . . goods or chat-  
 tels had made, conveyed, or assured . . . which  
 estate or interest . . . shall be upon good considera-  
 tion and *bona fide* . . . conveyed . . . to any person  
 . . . not having at the time of such conveyance . . .  
 any . . . notice or knowledge of such covin, fraud or  
 collusion as is aforesaid.”

The Statute has been interpreted to mean that if the deed is *bona fide*—that if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed<sup>6</sup>. It has no regard whatever to the question of preference or priority among the creditors of the debtor<sup>7</sup>, nor is it material under the Statute whether the deed deals with the whole or only a part of the grantor's property<sup>8</sup>.

The following very brief summary of the law will be found useful in deciding whether any particular set of facts falls under 13 Eliz. c. 5, or not.

The dominant question is whether the conveyance was made with intent to delay or defraud creditors in the sense in which that phrase has already been defined. Intent must be clearly proved. To this end the surrounding circumstances can be looked at. The effect of the debtor remaining in possession is significant, but it may be explained, as where the transaction is a

<sup>6</sup> Per Giffard, L.J., in *Alton v. Harrison* (1869), L. R. 4 Ch. 622; 28 L. J. Ch. 669.

<sup>7</sup> Per Jessell, M.R., in *Middleton v. Pollock* (1876), 2 Ch. D. 104, 108, 109; *Glegg v. Bromley* (1912), 3 K. B. 474, 485, 492; 81 L. J. K. B. 1081; *New, Prance & Garrard's Trustee v. Hunting* (1897), 2 Q. B. 19; *Maskelyne & Cooke v. Smith* (1903), 1 K. B. 671; 72 L. J. K. B. 237; 10 Mans. 121.

<sup>8</sup> Per Giffard, L.J., in *Alton v. Harrison* (1869), L. R. 4 Ch. 622, 626; 28 L. J. Ch. 669; *In re Bamford*, 12 Ch. D. 314; *In re and ex parte Cranston* (1892), 9 Mor. 160, 167; but see *Ex parte O. R. in re Hirth* (1899), 1 Q. B. D. 612, 620; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 243; 6 Mans. 10.

Cases within  
13 Eliz. C. 5.



Section 3(b) mortgage, or possession by the vendor is consistent with the deed. It must also be shown that the transferee had knowledge of the fraud<sup>9</sup>, except where the conveyance is voluntary<sup>10</sup>. Where a voluntary settlement is made on the eve of engaging in trade, the burden rests on the settlor of shewing that he was in a position to make it<sup>1</sup>. There is not necessarily want of *bona fides* if the debtor is deliberately preferring particular creditors; for he has a common law right so to do<sup>2</sup>. A dissolution of a partnership when the partners are insolvent may be *mala fide*, as regards creditors<sup>3</sup>, and so may a transfer to a company of all the property of a firm or debtor<sup>4</sup>.

The fact that valuable consideration passes will not validate a transaction, if *bona fides* is absent<sup>5</sup>; but if there is valuable consideration fraud must be proved in order to invalidate it<sup>6</sup>. In order to set aside a voluntary deed it is not necessary that the settlor should have been in a state of insolvency when making the deed. Intent is all that is required. In the case of a voluntary settlement intent will be inferred if the transaction has a necessary tendency to defeat and

<sup>9</sup> *Ex parte O. R. in re Hirth* (1899), 1 Q. B. 612; 68 L. J. Q. B. 287; 47 W. R. 243; 80 L. T. 63; 6 Mans. 10; *Fraser v. Thompson* (1859), 4 DeG. & J. 659; *Campion v. Cotton* (1810), 17 Ves. 263; *Bulmer v. Hunter* (1869), L. R. 8 Eq. 46; 38 L. J. Ch. 543; 20 L. T. 942; *Kewan v. Crawford* (1877), 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49; *In re and ex parte Pennington* (1888), 59 L. T. 774; 5 Mor. 268; *Ex parte Games in re Bamford* (1879), 12 Ch. D. 314, 322.

<sup>10</sup> *Oliver v. McLaughlin* (1893), 24 O. R. 41; and see *Sun Life Assurance Co. v. Elliott* (1901), 31 S. C. R. 91.

<sup>1</sup> *McKay v. Douglas* (1872), L. R. 14 Eq. 106; 41 L. J. Ch. 539; *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S. C. R. 44; *Ex parte Russell in re Butterworth* (1882), L. R. 19 Ch. D. 588; 51 L. J. Ch. 521; *Alexandria Oil Co. v. Cook* (1909), 14 O. W. R. 604.

<sup>2</sup> *Mulcahy v. Archibald* (1898), 38 S. C. R. 523.

<sup>3</sup> *Ex parte Mayou in re Wood* (1865), 4 DeG. J. & S. 664; 11 Jur. (N.S.) 433; 34 L. J. Bank. 25; *Pearce v. Bulteel* (1916), 2 Ch. 544.

<sup>4</sup> *Gonville's Trustee v. Patent Caramel* (1912), 1 K. B. 599; 81 L. J. K. B. 291; 105 L. T. 831; 19 Mans. 37; *Ex parte Silverstone v. Goldburg* (1912), 1 K. B. 384; 81 L. J. K. B. 382; 105 L. T. 959; 19 Mans. 44.

<sup>5</sup> *Holmes v. Penney* (1856), 26 L. J. Ch. 179; 3 K & J. 90; *Harman v. Richards* (1853), 22 L. J. Ch. 1066.

<sup>6</sup> *In re David & Adlard or Johnson ex parte Whinney* (1914), 2 K. B. 694; 83 L. J. K. B. 1173; 110 L. T. 942; 21 Mans. 148; *In re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389; 51 L. J. Ch. 154; 46 L. T. 222.



delay creditors; while there must be evidence of actual Section 3(b)  
or express intent in cases where valuable consideration  
has passed<sup>7</sup>.

As to the instruction of a jury in suits to set aside Instructions to jury.  
conveyances contrary to 13 Eliz. c. 5, see *Griffiths v. Boscowitz*<sup>8</sup>.

In Ontario where a creditor sues to set aside under Right of creditor to have deed set aside under 13 Eliz.  
the Statute of Elizabeth a fraudulent conveyance, he must sue on behalf of all the creditors unless he has first obtained judgment and execution. When he sues on behalf of all creditors his relief will be confined to setting aside the fraudulent conveyance, leaving him to take independent proceedings if he wishes to have execution against the property so fraudulently conveyed<sup>9</sup>. He cannot in the same suit have judgment against the defendant for his debt<sup>10</sup>.

(b) The provisions of the Civil Code of the Province of Quebec with respect to the avoidance of contracts and payments made in fraud of creditors are (b) Provisions of the civil code of Quebec.  
to be found in Articles 1032-1040<sup>11</sup>.

<sup>7</sup> See generally as to 13 Eliz. c. 5, May on Fraudulent and Voluntary Conveyances (Stevens and Haynes) and *Twynne's Case I.*, S. L. C., vol. I., p. 1; Snider's annotations to R. S. O. 1914, c. 105: (The Carswell Co., Ltd.)

<sup>8</sup> 1891, Cameron's Supreme Court Cases, 239.

<sup>9</sup> *Oliver v. McLaughlin* (1893), 24 O. R. 41.

<sup>10</sup> *Urquhart v. Aird* (1905), 6 O. W. R. 115, 506; *Tierney v. Slattery* (1906), 7 O. W. R. 489.

<sup>11</sup> These are:

Art. 1032. Creditors may in their own name impeach the acts of their debtors in fraud of their rights, according to the rules provided in this section. N. 1167—c. 484, 655, 745, 803, 2023, 2187.

Art. 1033. A contract cannot be avoided unless it is made by the debtor with intent to defraud and will have the effect of injuring the creditor.

Art. 1034. A gratuitous contract is deemed to be made with intent to defraud if the debtor be insolvent at the time of making it.

Art. 1035. An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.

Art. 1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.

Art. 1037. Repealed by the Federal Act respecting the Revised Statutes of Canada—49 Vic. c. 4, s. 5, Schedule A. (2nd June, 1886)—R. S. Q. (1888), Art. 6233. (This Article formerly read: "Further provision concerning the presumption of fraud and the nullity of acts



## Section 3(b)

(c)  
Other Provincial enactments.

(c) Other specific Provincial enactments with respect to fraudulent conveyances are to be found in the various Provincial Voluntary Assignments and Preferences Acts<sup>12</sup>.

Criminal dispositions of property.

Section 417(a)(b) of *The Criminal Code*<sup>13</sup> reads:

417. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

- (a) with intent to defraud his creditors, or any of them,
  - (i) makes, or causes to be made any gift, conveyance, assignment, sale, transfer, or delivery of his property, or
  - (ii) removes, conceals or disposes of any of his property; or
- (b) with the intent that any one shall so defraud his creditors, or any of them, receives any such property.

It has been held in a prosecution under this section that it is not essential that at the time of the sale the

done in contemplation of insolvency are contained in *The Insolvent Act of 1864*.)

Art. 1038. An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts, is not voidable; saving the special provisions applicable in case of insolvency of traders.—C. 803, 2023, 2085, 2090.

Art. 1039. No contract or payment can be avoided by reason of anything contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor.

Art. 1040. (No contract or payment can be avoided by reason of anything contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof. If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment).

<sup>12</sup> These are: Ontario, R. S. O. (1914), c. 134, amended 1914, c. 21. Nova Scotia, R. S. N. S. (1900), c. 145; 1901, c. 34; 1902, c. 12; 1903-4, c. 31; 1908, c. 21; 1913, c. 28, s. 17; 1914, cc. 37, 38; 1917, c. 38. New Brunswick, C.S. N. B. (1903), c. 141; 1911, c. 40. Prince Edward Island, 1898, c. 4; 1899, c. 14; 1905, c. 9; 1906, c. 11. Manitoba, R. S. M. (1913), c. 12 (and see 13); 1913-14, c. 6; 1915(2), c. 1; 1919, c. 7. British Columbia, R. S. B. C. (1911), c. 13; 1913, c. 3; 1914, c. 3; 1915, c. 8. Alberta, 1907, c. 6; 1916, c. 3, s. 32; 1918, c. 4, s. 9. Saskatchewan, R. S. S., 1909, c. 142; 1912, c. 42, s. 22; 1912-13, c. 19; 1914, c. 20, s. 6; 1915, c. 43, s. 22; 1916, c. 37, s. 21. Yukon, C. O. Y., 1902, c. 38; 1914, c. 73; 1916, c. 1. North-West Territories, C. O. N. W. T., 1898, c. 42; 1900, c. 11.

<sup>13</sup> R. S. C. 1906, c. 146.



debt of the creditor should be due<sup>14</sup>. The depositions of a judgment-debtor on his examination may be used in evidence against him on a charge under this section unless at the time of the examination he objected to answer on the ground that his answers might tend to criminate him<sup>15</sup>.

3 (c) If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a fraudulent preference if he were adjudged bankrupt;

**Cross References Act:** Fraudulent preference defined 31; contract 3(b) (g); for meaning of "or elsewhere," see notes to section 3(a); property defined 2(dd).

**Analogous Legislation:** English Act, 1914, s. 1(1) (c).

#### ANALYSIS OF NOTES.

A preference is not void at common law or under Statute of Elizabeth.

Whether the statutory definition alone may be looked at.

Whether a fraudulent preference is avoided as an act of bankruptcy.

The words "which would under this Act be void as a fraudulent preference" are very much narrower than the words in section 3(b), and may limit acts of bankruptcy under section 3(c) to cases falling precisely within the scope of section 31.

Apart from *The Bankruptcy Act*<sup>1</sup>, both at common law and under the Statute of Elizabeth, a conveyance to a creditor with a view to giving him a preference is unimpeachable<sup>2</sup>.

A preference is not void at common law or under Statute of Elizabeth.

It has been said in England that in determining

<sup>14</sup> *R. v. Henry* (1891), 21 O. R. 113.

<sup>15</sup> *R. v. Van Meter* (1906), 11 Can. Cr. C. 207, and see generally on the section: *R. v. Potter* (1860), 10 U. C. C. P. 39; *R. v. Shaw* (1899), 31 N. S. R. 534; *R. v. Ayoub* (1910), 39 N. B. R. 598; 16 Can. Cr. C. 375.

<sup>1</sup> And similar legislation, such as the Winding-up Act and Provincial Assignments Acts.

<sup>2</sup> *Ex parte Games in re Bamford* (1879), 12 Ch. D. 314; *Glegg v. Bromley* (1912), 3 K. B. 474, 485, 492; 81 L. J. K. B. 1081; *Middleton v. Pollock* (1876), 2 Ch. D. 104, 108, 109; *Alton v. Harrison*, L. R. 4 Ch. 622.



**Section 3(c)** what amounts to a fraudulent preference the court ought now to have regard simply to the statutory definition contained in the equivalent of section 31; previous decisions may be useful as guides, but the standards there laid down must not be substituted for that which is laid down in the Act<sup>3</sup>. In Canada there is no Dominion law respecting fraudulent preferences other than that contained in *The Bankruptcy Act* and the *Winding-Up Act*, but there are provincial enactments respecting fraudulent preferences.

Whether the statutory definition alone may be looked at.

In the notes to section 3 *supra*, the point has already been raised whether a fraudulent preference which is an available act of bankruptcy may be avoided after the period mentioned in section 31. A similar situation existed under *The English Bankruptcy Act* of 1869. By section 6(2) of that Act, a fraudulent conveyance, gift, delivery or transfer was made an act of bankruptcy<sup>4</sup>, and such an act of bankruptcy was available as a foundation for a petition for six months after it took place<sup>5</sup>. Section 92 of the same Act introduced a legislative definition of a fraudulent preference and declared that such a preference should be avoided as against the trustee if the debtor were adjudged bankrupt within three months after the transaction.

It is not proposed here to speculate on the result.

Section 32 is made "subject to the foregoing provisions of the Act with respect to the avoidance of certain settlements and preferences." This appears to refer to section 31; and not to section 3(c), or to any doctrine of interpretation of that section.

<sup>3</sup> *Ex parte Griffith in re Wilcoxon* (1883), 23 Ch. D. 69; 52 L. J. Ch. 717; see *Brayley v. Ellis* (1884), 9 O. A. R. 565, 590.

<sup>4</sup> This was said to include a fraudulent preference. See *per Mellish, L.J.*, in *Ex parte Halliday in re Liebert* (1873), L. R. 8 Ch. 283, 288; and see *Allen v. Bonnett* (1870), L. R. 5 Ch. 570; Robson *Bankruptcy*, 3rd edition, 1876, p. 123, notes (d) and (e).

<sup>5</sup> Section 6, but see *In re Liverpool & London Guarantee & Accident Insurance Co., Gallagher's Case* (1880), 46 L. T. 54; 30 W. R. 378. Contrast *Ex parte Games in re Bamford* (1879), 12 Ch. D. 314.



3 (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling house or otherwise absents himself, or begins to keep house; Section 3(d)  
Absconding.

**Analogous Legislation:** English Act, 1914, s. 1(1) (d); Canadian Act, 1875, s. 3(b).

#### ANALYSIS OF NOTES.

Intent.

Intent to defeat or delay.

Intent alone not enough.

Onus of proof.

Amendments.

Departs out of Canada.

Remains out of Canada.

Departs from his dwelling house.

Otherwise absents himself.

Begins to keep house.

As to the difference in intent under this sub-section and under 3(a)(b)(c), see *In re Wood*<sup>9</sup>. The intent must be specifically alleged<sup>10</sup>, and there must be such intent<sup>1</sup>. The intent is the intent of the debtor; it does not depend on the intent of the creditor<sup>2</sup>, and it is a question of fact whether the debtor intends to defeat or delay the creditors<sup>3</sup>. Thus a letter by the bankrupt may be put in to prove intent<sup>4</sup>, and where the debtor knows that the necessary consequence of his conduct will be to defeat or delay certain creditors, he will be held to have acted with that intent<sup>5</sup>. Whether the circumstances are such that the debtor can be said to have foreseen the consequences of his act will depend on the facts of the case<sup>6</sup>. Failure to keep an appoint-

<sup>9</sup> (1872), L. R. 7 Ch. 302; 41 L. J. Bank. 21.

<sup>10</sup> *Ex parte Coates in re Skelton* (1877), 5 Ch. D. 979; 37 L. T. 46; 25 W. R. 800.

<sup>1</sup> *Ex parte Osborne v. Parr* (1813), 1 Rose, 387.

<sup>2</sup> *Ex parte White* (1814), 3 V. & B. 128; *Ex parte Harris* (1814), 2 Rose, 67, and see *Mucklow v. May* (1809), 1 Taunt. 479.

<sup>3</sup> *In re Woolstenholme ex parte Foster* (1887), 4 Mor. 258.

<sup>4</sup> *Rouch v. G. W. Ry.* (1841), 1 Q. B. 51; 4 Perry & Davidson, 686.

<sup>5</sup> *Ex parte Goater in re Finney* (1874), 30 L. T. 620; *Ex parte Külnier in re Bryant* (1837), 3 M. & A. 722; *Holroyd v. Whitehead* (1814), 3 Camp. 530.

<sup>6</sup> *Ramsbottom v. Lewis* (1808), 1 Camp. 279.



Section 3(d) ment at the house of a creditor to pay money due on a dishonoured bill is *prima facie* evidence of intent to defeat or delay one's creditors; and the onus lies on the debtor to prove that he had no such intent<sup>7</sup>.

An intent to begin to keep house on the happening of a contingency should be distinguished from an actual beginning to keep house. The former is not an act of bankruptcy; nor it seems, is a departure from a dwelling house, not with an absolute, but with an inchoate intent to delay creditors, an act of bankruptcy<sup>8</sup>.

Intent to  
defeat or  
delay.

An intent to delay should be distinguished from an intent to defeat. Thus there may be a keeping house by a debtor with intent to delay creditors, in order to give himself time to get money to clear his liability. This would not be intent to defeat; but it is an act of bankruptcy<sup>9</sup>. Proof of actual delay is unnecessary. There is an act of bankruptcy where the absenting is with intent, even though no creditor was delayed, and none could possibly have been delayed<sup>10</sup>.

Intent alone  
not enough.

In addition to proof of intent there must be proof of one or more of the acts set out in section 3(d). A mere direction to be denied, not followed up by shutting the doors or retreating to a different part of the house, or actual denial, is not in itself an act of bankruptcy<sup>1</sup>.

Onus of  
proof.

Where notwithstanding the ordinary presumption in favour of life the question arises on the facts proven whether the missing man has run away from his creditors, or is dead, *semble*, the onus is on the petitioning creditors to prove that he is alive<sup>2</sup>. In England when there has been no allegation of intent, and an adjudication made, there can be no amendment; it is otherwise before adjudication<sup>3</sup>.

Amendments.

<sup>7</sup> *Ex parte Meyer in re Stephany* (1871), L. R. 7 Ch. 188; 41 L. J. Bank 33; 25 L. T. 733; 25 W. R. 173.

<sup>8</sup> *Fisher v. Boucher* (1830), 10 B. & C. 705.

<sup>9</sup> *Richardson v. Pratt* (1885), 52 L. T. 614.

<sup>10</sup> *Chenoweth v. Hay* (1813), 1 M. & S. 676; *Williams v. Nunn* (1809), 1 Taunt. 270.

<sup>1</sup> *Hare v. Waring* (1838), 3 M. & W. 362.

<sup>2</sup> *Ex parte Geisel in re Stanger* (1882), 22 Ch. D. 436; 53 L. J. Ch. 349; 48 L. T. 405; 31 W. R. 264. See *in re Lewis ex parte Becker* (1893), 10 Mor. 141.

<sup>3</sup> *In re Fiddian Squire & Co.* (1892), 66 L. T. 203; 9 Mor. 95.



If a domiciled Englishman, who has been pressed <sup>Section 3(d)</sup> by his creditors, and is served with a writ, leaves <sup>Departs out of Canada.</sup> England, that fact would be strong evidence that he intended to defeat or delay his creditors. The same reasoning does not apply to a foreigner who has gone to England for a temporary purpose and leaves to return to his own home<sup>4</sup>, and where a domiciled Englishman has a permanent residence in France at which he lives, subject to occasional visits to England, the fact that he resides abroad is not alone sufficient to impute to him an intention to defeat or delay his creditors<sup>5</sup>.

Whether or not the going abroad was an act of <sup>Remains out of Canada.</sup> bankruptcy, the remaining abroad with intent to defeat creditors is a continuing act of bankruptcy, available as a foundation for a petition<sup>6</sup>.

As to what amounts to departing, see *Charrington* <sup>Departs from his dwelling house.</sup> v. *Brown*<sup>7</sup> and *Ex parte Austen*<sup>8</sup>. It is a question of fact whether the departure is with intent to defeat or delay<sup>9</sup>. Five furnished rooms on the third and fourth floors of a house may be a dwelling house<sup>10</sup>.

If a trader with intent to avoid the creditor <sup>Otherwise absents himself.</sup> absents himself from any place to which he knows a creditor is coming, he commits an act of bankruptcy<sup>1</sup>. *A fortiori*, if with the same intent he fails to keep an appointment with creditors with reference to a settlement of their demands whether the meeting places

<sup>4</sup> *Ex parte and in re Crispin* (1873), L. R. 8 Ch. App. 374, 382; 42 L. J. Bank. 65; 28 L. T. 483; 21 W. R. 491; *Ex parte and in re Gutierrez* (1879), L. R. 11 Ch. D. 298; 43 L. J. Bank 79; 40 L. T. 355; 27 W. R. 497.

<sup>5</sup> *Ex parte Brandon in re Trench* (1884), 25 Ch. D. 500; 53 L. J. Ch. 576; 50 L. T. 41; 32 W. R. 601. Contrast *In re and ex parte Campbell* (1887), 4 Mor. 198; and see generally *Ex parte Goater in re Finney, supra*; *Ex parte Külnier in re Bryant, supra*; *Ex parte Ramsbottom in re Lewis, supra*.

<sup>6</sup> *In re and ex parte Bunny* (1857), 1 DeG. & J. 309.

<sup>7</sup> (1826), 11 Moore 341.

<sup>8</sup> (1837), 2 Dea. 533.

<sup>9</sup> *In re Woolstenholme ex parte Foster* (1887), 4 Mor. 258; *In re and ex parte McKeand* (1889), 6 Mor. 240.

<sup>10</sup> *In re and ex parte Heoquard* (1889), 24 Q. B. D. 71; 38 W. R. 148; 6 Mor. 282; and see *Holroyd v. Gwynne* (1809), 2 Taun. 176; 1 Rose, 113; and notes to 2(o).

<sup>1</sup> *Curteis v. Willis* (1824), 1 Car. & P. 211; 6 D. & R. 244; Ry. & M. 58.



Section 3(d) were at the debtor's usual place of business or not<sup>2</sup>.

Where there has been such a failure to keep an appointment the onus lies on the debtor to prove he had no such intent<sup>3</sup>. Where a debtor keeps his appointment, but leaves before the meeting is over, the presumption is the same<sup>4</sup>.

It has also been held that the words "otherwise absents himself" mean an absenting of himself from his creditors, not from a particular place; so that a debtor who was present at the meeting place, but told a friend to tell his creditors he was not there, absented himself from the creditors<sup>5</sup>.

Where a married woman leaves her place of business without paying her creditors or notifying her change of address, and there is evidence to show an intent to evade service, there is an absenting within the section, even though she left at her husband's request in order to live with him elsewhere.<sup>6</sup>

Absenting one's self is a continuing act of bankruptcy<sup>7</sup>.

Begins to  
keep house.

A person who goes to his home, gives directions to deny him to anyone who calls, and continues nearly a month in his bedroom, begins to keep house, or otherwise absents himself<sup>8</sup>. An actual denial to a creditor is not essential<sup>9</sup>. If there is a denial, there must be evidence connecting the debtor with the denial<sup>10</sup>. But this can be done by showing that the debtor in his own house hears himself denied to a creditor and does not come forward. This is an act of bankruptcy if done with intent to delay creditors, even though he

<sup>2</sup> *Russell v. Bell* (1812), 10 M. & W. 340; *Ex parte Meyer in re Stephany* (1871), L. R. 7 Ch. 188; 41 L. J. Bank. 33; 25 L. T. 733; 20 W. R. 173; *Cf. Lees v. Marton* (1832), 1 M. & R. 210.

<sup>3</sup> *Ex parte Meyer in re Stephany*, *supra*.

<sup>4</sup> *In re and ex parte Dean* (1841), 2 M. D. & D. 127.

<sup>5</sup> *Gillingham v. Laing* (1816), 6 Taunt. 532; *In re Alderson ex parte Jackson* (1895), 1 Q. B. 183; 64 L. J. Q. B. 188; 1 Mans. 495; but see *Bernasconi v. Farebrother* (1830), 10 B. & C. 549, 556, 557.

<sup>6</sup> *In re Worsley* (1901), 1 K. B. 309; 70 L. J. K. B. 93; 49 W. R. 182; 84 L. T. 100; 8 Mans. 8.

<sup>7</sup> *In re Alderson ex parte Jackson*, *supra*.

<sup>8</sup> *Bayly v. Schofield* (1813), 1 M. & S. 338.

<sup>9</sup> *Bayly v. Schofield*, *supra*, per Bayley, J., p. 353; *Clements v. McKibbin* (1857), 2 H. & N. 62; *Key v. Shaw* (1832), 8 Bing. 320; *Richardson v. Pratt* (1885), 52 L. T. 614.

<sup>10</sup> *Ex parte and in re Curtis* (1893), 9 T. L. R. 387; *Ex p. Foster* (1810), 17 Ves. 416; 1 Rose, 50.



has given no directions to be denied. The question of intent is one of fact<sup>1</sup>. If a debtor gives a general order to be denied, and is denied to a creditor, it is a beginning to keep house, though he immediately overtakes the creditor and says he is not afraid of him, but of another creditor, for the denial was general, and did not except any creditor<sup>2</sup>. Where the creditor is denied when the debtor is at dinner, there is no act of bankruptcy if the intention is to avoid interruption at that hour and not to delay the creditor, although the creditor is delayed<sup>3</sup>; similarly a denial at 11 o'clock at night cannot be said to be done with intent to defeat or delay<sup>4</sup>.

Where a creditor calling at the debtor's house merely asks payment and does not ask to see the debtor, a denial of payment is no evidence of a beginning to keep house<sup>5</sup>, *aliter* where the debtor has withdrawn from the counting house to a room upstairs with a view to avoiding the personal solicitation of creditors<sup>6</sup>.

- 
- 3 (e) If he permits any execution or other process issued against him under which any of his goods are seized, levied upon or taken in execution to remain unsatisfied until within four days from the time fixed by the sheriff for the sale thereof, or for fourteen days after such seizure, levy or taking in execution, or if the goods have been sold by the sheriff or the execution or other process has been held by him after written demand for payment without seizure, levy or taking in execution or satisfaction by payment for fourteen days, or if it is returned endorsed to the effect that the sheriff can find no goods

Execution unsatisfied, goods sold by sheriff or no goods to be found.

<sup>1</sup> *Smith v. Moon* (1829), Moo. & Malkyns, 458; *Lloyd & Heathcote* (1820), 2 Brod. & Bing. 388.

<sup>2</sup> *Mucklow v. May* (1809), 1 Taunt. 479.

<sup>3</sup> *Smith v. Currie* (1813), 1 Rose, 364; 3 Camp. 349.

<sup>4</sup> *Ex parte Hall* (1753), 1 Atkyns, 201.

<sup>5</sup> *Dudley v. Vaughan* (1808), 1 Camp. 271. But see *Ex parte White* (1814), 3 V. & B. 128; *Ex parte Harris* (1814), 2 Rose 67.

<sup>6</sup> *Dudley v. Vaughan*, *supra*.



**Section 3(e)****Proviso.**

whereon to levy or to seize or take; provided that where interpleader proceedings have been instituted in regard to the goods seized, the time elapsing between the date at which such proceedings were instituted and the date at which such proceedings are finally disposed of, settled or abandoned, shall not be taken into account in calculating any such period of fourteen days;

**Cross References Act:** Goods defined 2(s); sheriff defined 2(hh). Consider the effect of 8(2); execution against married woman 2(v), 75, and see notes to 2(o).

**Analogous Legislation:** Canadian Act, 1875, s. 3(k); English Act, 1914, s. 1(e).

**ANALYSIS OF NOTES.**

Whether acts of bankruptcy mentioned in 3(e) are void.

Sale of goods by sheriff.

Computation of time.

No seizure, but written demands for payment.

Whether acts of bankruptcy mentioned in 3(e) are void.

In England an act of bankruptcy such as is mentioned in section 3(e) of *The Bankruptcy Act*, is not a void proceeding merely because it is an act of bankruptcy; for in the first place it is not an act of the bankrupt, being a proceeding *in invitum*; and in the second place the relation back of the title of the trustee is only to the moment after the completion of the transaction where that proceeding is a proceeding *in invitum*<sup>7</sup>.

Sale of goods by sheriff.

Hence the fact that the suffering of a levy by seizure and sale is an act of bankruptcy does not avoid or make inoperative the seizure and sale itself<sup>8</sup>. But if the sheriff has been in possession for fourteen days before sale, the execution creditor must be taken to have had notice of that fact within section 40 of the English Act of 1914<sup>9</sup>. And where there are two exe-

<sup>7</sup> *Ex parte Villars in re Rogers* (1874), L. R. 9 Ch. 432; 43 L. J. Bank 76. See further section 11(2).

<sup>8</sup> *Ex parte Villars in re Rogers* (1874), L. R. 9 Ch. 432; 43 L. J. Bank 76, decided before the English section which corresponds to section 11(2) of the Canadian Act was passed. In such cases, however, section 11(1) may apply. See *Heathcote v. Livesley* (1887), 19 Q. B. D. 285; 56 L. J. Q. B. 645.

<sup>9</sup> *Figg v. Moore* (1894), 2 Q. B. 690; 63 L. J. Q. B. 709; 1 Mans. 404. *Trustee of Burns-Burns v. Brown* (1895), 1 Q. B. 324; 64 L. J. Q. B. 248; 2 Mans. 23. Our Act contains no exact parallel to section 40. The nearest approach to it is section 11(1).



cutions by the same creditor under each of which there is a seizure and sale, the creditor must as regards the second be taken to have had notice of the act of bankruptcy constituted by the first<sup>10</sup>. Section 3(e)

The sheriff cannot make a valid contract for the sale of goods until he has actually seized them<sup>1</sup>.

Under the English practice, where a sheriff under an execution sells the goods of a debtor by private contract with the consent of the debtor, but without the leave of the court as required by section 145 of the Act of 1883 (46 & 47 Vic. c. 52), the sale is, until set aside by the court, valid as against a subsequent execution creditor<sup>2</sup>.

The payment out by a debtor of an execution on his goods is not a "sale"<sup>3</sup>.

There is no universal common law rule in the reckoning of time, each case depending on its own circumstances and subject-matter<sup>4</sup>. The question as to whether the day on which the act is done is to be included or excluded may depend on whether it is to the benefit or disadvantage of the person primarily interested. The question of whether the Statute mentions a terminus is important<sup>5</sup>. Computation of time.

In computing the length of time during which the goods of the debtor must have been held by the sheriff for an act of bankruptcy to have taken place, the day on which the seizure is made is to be excluded<sup>6</sup>.

Under the English Act the holding by the sheriff of the goods of the debtor for twenty-one days after seizure constitutes an act of bankruptcy. But if the

<sup>10</sup> *Ex parte Dawes in re Husband* (1875), L. R. 19 Eq. 438; 44 L. J. Bank 62.

<sup>1</sup> *Ex parte Hall in re Townsend* (1880), 14 Ch. D. 132; 42 L. T. 162.

<sup>2</sup> *Crawshaw v. Harrison* (1894), 1 Q. B. 79; 63 L. J. Q. B. 94; 1 Mans. 407.

<sup>3</sup> *In re Pearson ex parte West Cannock Colliery* (1886), 3 Mor. 187, and see *Ex parte Pearson in re Mortimer* (1873), L. R. 8 Ch. 667; 42 L. J. Bank 44.

<sup>4</sup> *Lester v. Garland* (1809), 15 Ves. 248; *Isaacs v. Royal Insurance Co.* (1870), L. R. 5 Ex. 296; *In re Railway Sleepers Supply Co.* (1885), L. R. 29 Ch. D. 204.

<sup>5</sup> *Per Rigby, L.J.*, in *Ex parte Hasluck in re North* (1895), 2 Q. B. 264; 64 L. J. Q. B. 694; 2 Mans. 326.

<sup>6</sup> *Ex parte Hasluck in re North*, *supra*. As to the meaning of section 82 with respect to the computation of time, see S. C.



**Sections  
3(f), 3(g)**

sheriff continues in possession and no adjudication of bankruptcy is made within the three months allowed by the English Act, the remaining in possession is not a continuous act of bankruptcy, nor is it a repeated act of bankruptcy on the happening of each fresh period of twenty-one days<sup>7</sup>. In calculating the fourteen days after seizure mentioned in section 3(e), the whole of the period occupied by the interpleader proceedings (including the day on which the summons is taken out and the day on which the order is made), is omitted<sup>8</sup>.

No seizure  
but written  
demand for  
payment.

As to payment where there has been no seizure, see *Ex parte Brooke in re Hassall*<sup>9</sup>.

Exhibits  
statement  
showing  
insolvency.

3 (f) If he exhibits to any meeting of his creditors any statement of his assets and liabilities which shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

**Cross References Act:** Insolvent defined 2(t), consider the effect of 8(2).

**Analogous Legislation:** English Act, 1914, s. 1(f) (g) (h). Canadian Act, 1875, s. 3(a).

This sub-section requires a much more formal and definite act on the part of the bankrupt than the corresponding section of the Act of 1875, under which a mere acknowledgment of insolvency was sufficient.

The exhibition to a meeting of creditors of a statement of assets and liabilities showing that the debtor is insolvent cannot be given "without prejudice"<sup>10</sup>.

Intent to  
defraud

3 (g) If he assigns, removes, secretes or disposes of or attempts or is about to assign, remove,

<sup>7</sup> *In re Beeston* (1899), 1 Q. B. 626; 68 L. J. Q. B. 344; 6 Mans. 27.

<sup>8</sup> *Per* Phillimore, J., *Mason v. Bolton's Library Limited* (1912), 2 K. B. 520; 81 L. J. K. B. 821; 19 Mans. 213; not reversed on this point on appeal (1913), 1 K. B. 83; 82 L. J. K. B. 217; 20 Mans. 1.

<sup>9</sup> (1874), L. R. 9 Ch. 301; 43 L. J. Bank. 49, and *Cf. Stock v. Holland* (1874), L. R. 9 Ex. 147; 43 L. J. Ex. 113; *In re Pearson ex parte West Cannock Colliery Co.* (1886), 3 Mor. 187.

<sup>10</sup> *In re Daintrey ex parte Holt* (1893), 2 Q. B. 116; 62 L. J. Q. B. 511; 10 Mor. 158.



secrete or dispose of any of his goods with intent to defraud, defeat or delay his creditors or any of them; Sections  
3(g), 3(h)

**Cross References Act:** Goods defined 2(s) : contrast 3(a)(b)(c) ; see as to bankruptcy offences 89 (d)(e)(h).

**Analogous Legislation:** Canadian Acts, 1875, s. 3(c)(d) ; 1864, s. 3(b)(c).

This section has been taken from *The Insolvent Act* of 1875. To a certain extent it duplicates sections 3(a)(b)(c). It is in some respects narrower than the Act of bankruptcy set out in section 3(a); in other respects it is a widening of that section. Under 3(g) the intent of the assignor must be established; this is not necessary under 3(a). On the other hand an assignment to fall under 3(a) must be of substantially the whole of the property of the debtor; while under 3(g) an assignment of any of the goods of the debtor with the requisite intent is sufficient. The corresponding section of the previous Canadian Act was not limited to goods. Certain cases not within 3(b) or 3(c) will no doubt be within 3(g).

A sale for full consideration to a *bona fide* purchaser is not made an act of bankruptcy within the section by the refusal of the debtor to pay over the proceeds to one of his creditors, where the debtor has ample means to satisfy all claims against him<sup>1</sup>.

A transaction by which goods were assigned to a company in return for debentures which would not be available to the creditors generally would be within this section if not within section 3(b)<sup>2</sup>.

For an example of an act of bankruptcy under this section see *In re The London Woolen Company (Shainer et al)*<sup>3</sup>.

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3 (h) If he makes any bulk sale of his goods Bulk sale.  
without complying with the provisions of

<sup>1</sup> *Royal Canadian Bank v. Matheson* (1870), 6 U. C. L. J. N. S. 9, and see *Sharp & Secord v. Matthews* (1869), 5 P. R. 10, and cases cited in *Royal Canadian Bank v. Matheson*, *supra*.

<sup>2</sup> *In re David and Adlard ex parte Whinney* (1914), 2 K. B. 894; 83 L. J. K. B. 1173; 21 Mans. 148.

<sup>3</sup> (1921) 1 C. B. R. 432 (Delisle, D.R.)



Section 3(h)

any Bulk Sales Act applicable to such goods in force in the province within which he carries on business or within which such goods are at the time of such bulk sale.

**Cross References Act:** Goods defined, 2(s).

**Analogous Legislation:** Canadian Act, 1875, s. 3(j).

*The Bulk Sales Acts* are designed to prevent the sale in fraud of creditors of,

- (a) the whole or substantially the whole of the stock-in-trade of a trader, manufacturer or such like person; or
- (b) of goods, wares or merchandise sold out of the ordinary course of business; or
- (c) of an interest in the business of the trader, manufacturer or such like person.

Unless the regulations prescribed by *The Bulk Sales Acts* are complied with, such sales are deemed fraudulent and void as against creditors. The Acts for the most part provide that on any bulk sale the purchaser shall:—

- (a) Obtain from the vendor a written statement verified by statutory declaration, containing the names, addresses and amounts of indebtedness of each of the vendor's creditors. It is the duty of the vendor to comply with this provision.
- (b) Either obtain written waiver from the creditors; or pay over to a trustee for distribution among the creditors of the vendor the purchase money<sup>5</sup>.

<sup>5</sup> Reference should be made to the following *Bulk Sales Acts*:— Ontario (1917), 7 Geo. V. c. 33; (1918), 8 Geo. V. c. 20, s. 60. Quebec (1910), 1 Geo. V. c. 39; (1914), 4 Geo. V. c. 63; Code, Arts. 1569 A. & E. Nova Scotia (1913), 3 Geo. V. c. 5. Manitoba (1913), R. S. M. c. 23; amended 1913-14, c. 13. British Columbia (1913), 3 Geo. V. c. 65. Alberta (1913), 4 Geo. V. c. 10; 1919, c. 38. Saskatchewan (1913), 4 Geo. V. c. 34.

The following cases touch on the duty of the vendor: *Rousseau v. Heirs of A. J. Dubuc*, 25 D. L. R. 854; 47 Que. S. C. 127; *Walter v. Leduc Lumber Co.* (1915), 8 W. W. R. 360.



*Petition and Receiving Order.*Section 4

- 4 (1) Subject to the conditions hereinafter Bankruptcy petition.  
specified, if a debtor commits an act of bankruptcy a creditor may present to the court a bankruptcy petition.
- (2) The petition shall be verified by affidavit Affidavit.  
and served on the debtor in the prescribed manner.
- (3) A creditor shall not be entitled to present a Conditions on which creditor may petition.  
bankruptcy petition against a debtor unless,—
  - (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to five hundred dollars; and,
  - (b) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.
- (4) The petition shall be presented to the court Court.  
having jurisdiction in the locality of the debtor.
- (5) At the hearing the court shall require proof Proof of debt. etc.  
of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may adjudge the debtor a bankrupt and in pursuance of the petition, make an order, in this Act called a receiving order, for the protection of the estate.
- (6) If the court is not satisfied with the proof May dismiss petition.  
of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or, in case an authorized assignment has been made, that the



Section 4

Stay of  
proceedings.

estate can be best administered under the assignment, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

- (7) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

Receiving  
order on  
another  
petition.

- (8) Where proceedings have been stayed or have not been prosecuted with effect the Court may, if by reason of the delay or for any other cause it is deemed just so to do, make a receiving order on the petition of another creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-prosecuted proceedings.

Petition  
cannot be  
withdrawn.

- (9) A creditor's petition shall not, after presentment, be withdrawn without the leave of the court.

Commence-  
ment of  
bankruptcy.

- (10) The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the presentation of the petition on which a receiving order is made against him.

Proceedings  
taken in  
wrong court.

- (11) Provided, however, that nothing herein contained shall invalidate any proceedings by reason of the same having been commenced, taken or carried on in the wrong court, but the court may at any time transfer to the proper court the petition, application or proceedings, as the case may be.



**Cross References Act:** Acts of bankruptcy, 3; available acts of bankruptcy, 2(*h*), 8(2); affidavit defined, 2(*a*); debtor defined, 2(*o*); creditor defined, 2(*m*); proceedings in case of partnership or where more respondents or petitions than one, 68(7), 69, 70; locality defined, 2(*x*); "province of debtor's locality", 6(4); authorized assignment, 9; relation back of title of trustee, 6(3), 25; interim receiver, 5; a receiving order and adjudication may be made on the annulment of a composition 13(14) (15), or on the failure of a proposal for a composition, 13(3f); adjudication may be annulled on approval of composition, 13(18); evidence, 68(6); Courts of Bankruptcy, 63, 74; style of cause, 68(1); by whom a corporation, firm or lunatic may act, 85; debt provable in bankruptcy defined, 2(*n*); debts provable, 44; petition defined, 2(*bb*); annulment of adjudication, 62; stay of proceedings under a petition, 68(10); substitution of petitioner, 68(8); continuance of proceedings where debtor dies, 68(9); returns to Dominion Statistician, 24(2) (*a*); power to review, rescind or vary any order, 74(1).

## Section 4

**Cross References Rules:** Petitions to be sealed, 10; proceedings in petition generally, 74 to 84; hearing of petition, 87 to 91; receiving order, 92 to 96; costs of petition, 55; name of solicitor to be endorsed on, 50; affidavits, 18, 26 to 33; security in court, 21 to 25; interim receiver, 85, 86; transfer of proceedings to proper court, 11, 12.

**Cross References Forms:** Creditors' petition and notice of hearing, 2; affidavit of truth of statements in petition, 3, 4; affidavit of service of petition, 5; notice of substituted service of petition, 6; order for substituted service of petition, 7; notice by debtor of intention to oppose petition, 8; order to stay proceedings on petition, 9; bond on stay of proceedings; 1; surety, etc., 10; notice of sureties, 11; affidavit of justification, 12; dismissal of petition, 13; receiving order, 14; order of transfer of proceedings, 16; general title, 1.

**Analogous Legislation:** Canadian Acts, 1875, ss. 4 to 16; 1869, ss. 15-24, 2, 10; English Acts, 1914, ss. 3, 4, 5, 18; 1883, ss. 5, 6, 7, 20.

## ANALYSIS OF NOTES.

Who may present petition.

Who may petition.

Estoppel.

Whether the "debt owing" must be presently payable.

And a liquidated sum.

Purchase of a debt.

Act of bankruptcy within six months of petition.

Proof of the debt—

A judgment not conclusive.

Disputed debt.

Tender.

Accord and satisfaction.

Whether the estate can best be administered under the assignment.

"Other sufficient cause"—

(*a*) No assets.

(*b*) Destruction of assets.

(*c*) Property not immediately available.

(*d*) Indirect motive.

(*e*) Only one creditor.

(*f*) Surety.

(*g*) Debts not yet due.

(*h*) Previous application for a receiving order refused.

Effect of receiving order and adjudication.

Where proceedings are stayed under section 4(7).

Withdrawal of petition under section 4(9).



Section 4

## Section 4(10)—

Distinction between relation back of bankruptcy of debtor and relation back of title of trustee.

Relation back of title of trustee.

Severity of the doctrine is mitigated by section 32 and two rules followed by the court.

Incapacity of the debtor.

Right of debtor to sue—

Costs.

Position of agents of the debtor—

Appropriation for past services.

Dealings with trustee *de son tort*.

Repayment.

Adjudication conclusive.

Estoppel of trustee.

Rights of secured creditors.

Section 4(11): Proceedings taken in wrong court.

## Section 4(2)

Section 4(2) is given as it was enacted by section 4 of *The Bankruptcy Act Amendment Act, 1920*. Sections 4(6) and 4(10) are given in the form in which they now stand as amended by sections 6 and 7 of *The Bankruptcy Act Amendment Act, 1921*<sup>1</sup>. Section 4(8) is in the form in which it was enacted by section 54 of *The Bankruptcy Act Amendment Act, 1921*.

Who may  
present  
petition.

In Ontario, under the provincial practice introduced by Rule 152, only a solicitor or a petitioner himself may present a bankruptcy petition. Such a petition may not be presented by an authorized trustee for a petitioner<sup>2</sup>. As to the authority of officers of a corporation to present a petition, see section 85.

<sup>1</sup> The previous sections read:

4(2) The petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and he served on the debtor in the prescribed manner.

4(6) If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or, in case an authorized assignment has been made, that the estate can be best administered under the assignment, or that for other sufficient cause no order ought to be made, it may dismiss the petition.

4(8) Where proceedings are stayed, the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

4(10) The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the service of the petition on which a receiving order is made against him.

<sup>2</sup> *In re X* (1920), 1 C. B. R. 459; 19 O. W. N. 12 (Holmsted, R.); contrast *In re Shaw* (1920), 19 O. W. N. 153 (Holmsted, R.). The petition is presented to the Court on the day of the filing thereof, Rule 76.



Creditor for the purpose of this section is not defined in the Act<sup>3</sup>. The word does not include the garnishor of a debt due from the debtor<sup>4</sup>, but it includes the equitable assignee of a part of a debt; and such assignee is not required to join the persons interested in the remainder of the debt as co-petitioners or respondents<sup>5</sup>. The endorser of a discounted bill of exchange is not such a creditor of the acceptor that he can because of his liability to pay the bill if the acceptor make default, present a petition against the acceptor<sup>6</sup>.

Section 4  
Who may  
petition.

*Seemle*, an infant creditor can take proceedings in bankruptcy, though if an application be made by the debtor to have some adult named to give security for costs, the application would no doubt be successful<sup>7</sup>. The holder of a general power of attorney may petition in the name of the creditor<sup>8</sup>. Where a debt is vested in a mere trustee for an absolute beneficial owner the trustee cannot sustain a petition without joining the *cestui que trust*<sup>9</sup>; but where as to part of the debt the petitioning creditor was trustee for another person who had not joined as co-petitioner, and had not given his consent, the *cestui que trust* did not require to be joined<sup>10</sup>. Where one of three creditors to whom a joint debt is due has died the two survivors may present a petition against the debtor<sup>1</sup>.

If several creditors unite in a petition, they must stand or fall together<sup>2</sup>. Where a tender of the amount of his debt is made to one of the creditors whose debt is necessary to make the aggregate of five hundred

<sup>3</sup> See section 2(m).

<sup>4</sup> *In re Combined Weighing and Advertising Machinery Company* (1889), 43 Ch. D. 59 L. J. Ch. 26.

<sup>5</sup> *In re Steel Ring Co.* (1920), B & C. R. 160.

<sup>6</sup> *In re Thomas* (1921) 1 C. B. R. 473; 20 O. W. N. 180 (Orde, J.).

<sup>7</sup> *Ex parte Brocklebank* (1877), 6 Ch. D. 358; 46 L. J. Bank. 113.

<sup>8</sup> *Ex parte and in re Wallace* (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 1 Mor. 246.

<sup>9</sup> *Ex parte Culley in re Adams* (1878), 9 Ch. D. 307; 47 L. J. Bank. 97; *Ex parte Dearle in re Hastings* (1884), 14 Q. B. D. 184; 54 L. J. Q. B. 74; 1 Mor. 281; *In re Ellis ex parte Hinshelwood* (1887), 4 Mor. 283.

<sup>10</sup> *In re and ex parte Gamgee* (1891), 60 L. J. Q. B. 574; 8 Mor. 162.

<sup>1</sup> *In re and ex parte Tucker* (1895), 2 Mans. 358. See as to a joint petition by money lenders *In re and ex parte Debtor* (No. 5 of 1919) (1918-1919), B. & C. R. 282.

<sup>2</sup> *Ex parte Kibble in re Onslow* (1875), L. R. 10 Ch. 373; 44 L. J. Bank. 63; *Ex parte Gill in re Shaw* (1901), 83 L. T. 754; 49 W. R. 264.



**Section 4** dollars, this does not prevent an adjudication<sup>3</sup>, nor does a payment into court by the debtor of the amount due<sup>4</sup>, for the creditor has a right to refuse the tender after knowledge of the act of bankruptcy<sup>5</sup>, and should he accept it, he may be required later to pay over such moneys to the trustee<sup>6</sup>. There is no provision in *The Bankruptcy Act* such as is found in section 4(2) of the English Act of 1914, with respect to petitions by secured creditors<sup>7</sup>.

Estoppel.

A creditor may be estopped from relying on a particular act of bankruptcy in presenting his petition. Thus, where a creditor assents to an assignment of the debtor's property for the benefit of his creditors, or stands by and encourages the execution of the deed<sup>8</sup>, or recognizes the title of the trustee under the assignment<sup>9</sup>, or accepts payment of a dividend<sup>10</sup>, he cannot rely on the assignment as an act of bankruptcy, nor on the circular calling the meeting<sup>1</sup>, unless the deed contains an unexplained preference in favour of a particular creditor<sup>2</sup>, or is otherwise fraudulent against the creditor<sup>3</sup>. Similarly when creditors assent to a

<sup>3</sup> *In re Andrew* (1875), 1 Ch. D. 358; 45 L. J. Bank. 57, and see notes to section 4(6).

<sup>4</sup> *In re Gentry* (1910), 1 K. B. 825; 79 L. J. K. B. 585; 17 Mans. 104, *aliter*, if the money is accepted, *per* Cozens-Hardy, L.J., *In re Gentry*, *supra*.

<sup>5</sup> *Ex parte* and *in re Lowe* (1890), 62 L. T. 263; 7 Mor. 25, and see *infra*, p. 138.

<sup>6</sup> *Hood v. Newby* (1882), 21 Ch. D. 605; 52 L. J. Ch. 204; *Ex parte Edwards in re Chapman* (1884), 13 Q. B. D. 747; 1 Mor. 238. It may be also that acceptance of the tender would be contrary to the spirit of section 4(9).

<sup>7</sup> See generally as to petitions by secured creditors: *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *In re Button ex parte Voss* (1905), 1 K. B. 602; 74 L. J. K. B. 403; 12 Mans. 111. A surety can be made a bankrupt even though the creditor holds security for the debt on property which is not the property of the debtor. In such case the creditor is not *qua* the surety a secured creditor: *In re and ex parte Debtor* (1919), 88 L. J. K. B. 1248; (1918-19), B & C. R. 221; *In re Hodges, ex parte Matthews* (1896), 3 Mans. 329.

<sup>8</sup> *Ex parte* and *in re Stray* (1867), L. R. 2 Ch. 374; 36 L. J. Bank. 7; *Gardner v. Kloeffer* (1885), 7 O. R. 603.

<sup>9</sup> *Ex parte* and *in re Woodroff* (1897), 76 L. T. 502; 4 Mans. 46; *Ex parte Ridgway in re Hawley* (1897), 76 L. T. 501; 4 Mans. 41; *Ex parte Taylor & Co. in re Brindley* (1906), 1 K. B. 377; 75 L. J. K. B. 211; 13 Mans. 1, but contrast *In re Murrieta ex parte South American Co.* (1896), 3 Mans. 35, and see notes to section 3(a).

<sup>10</sup> *Beemer v. Oliver* (1884), 10 O. A. R. 656, 662. See *Miller v. Hamlin* (1882), 2 O. R. 103.

<sup>1</sup> *Ex parte* and *in re Woodroff* (1897), 76 L. T. 502; 4 Mans. 46. The most similar section under our Act is 3(f).

<sup>2</sup> *In re and ex parte Marshall* (1841), 1 M. D. & D. 575.

<sup>3</sup> See notes to section 3(a).



deed of composition on the understanding that if the debtor makes default he will make an assignment, such creditors cannot rely on an assignment demanded by the trustee of the composition, even where the assignment is not in accordance with the composition, and so does not bind them for all purposes<sup>4</sup>; but a creditor who has assented to a proposed deed of assignment may revoke his assent before the deed is executed. He is then not precluded from relying on any acts of bankruptcy leading up to or connected with the proposed assignment<sup>5</sup>; and where the creditor though prevented by his conduct from founding a bankruptcy petition on a deed of assignment is not actually bound by the terms of the deed he may found a petition on an independent act of bankruptcy<sup>6</sup>. A creditor may, by attempting to coerce the debtor into a fraud, so taint the transaction that he precludes himself from obtaining a receiving order on that particular act of bankruptcy<sup>7</sup>. Where objection is taken to a petition that the creditor has assented to, acquiesced in or submitted to the deed of assignment relied on as the act of bankruptcy, the onus is on the person raising such objection to establish the assent, acquiescence or submission<sup>8</sup>. A much stronger case is required when the alleged acquiescence or submission comes after the deed is executed than when it comes before<sup>9</sup>. Nor is it sufficient to show that the creditor merely had notice of the deed being executed; it must be shown that he intentionally took advantage of the deed being executed<sup>10</sup>.

It can be argued with some force that the "debt owing" referred to in section 4(3)(a) means a debt "presently payable". Under the Act 5 Geo. II c. 30, <sup>Whether the debt owing must be presently payable.</sup>

<sup>4</sup> *Ex parte Viney in re Adamson*, 43 W. R. 192; 2 Mans. 153; *Ex parte and in re Stray* (1867), L. R. 2 Ch. 374; 36 L. J. Bank. 7.

<sup>5</sup> *Ex parte Associated Newspapers in re Jones Brothers* (1912), 3 K. B. 234; 81 L. J. K. B. 1178; 19 Mans. 349.

<sup>6</sup> *Ex parte and in re Mills* (1906), 1 K. B. 389; 75 L. J. K. B. 247; 13 Mans. 9.

<sup>7</sup> *Ex parte Gill in re Shaw* (1901), 83 L. T. 754; distinguish *In re Sunderland* (1911), 2 K. B. 658; 80 L. J. K. B. 825; 18 Man. 123; and see further notes to section 4(6).

<sup>8</sup> *Ex parte and in re Michael*, 8 Mor. 305.

<sup>9</sup> S. C.

<sup>10</sup> S. C.



## Section 4

s. 22, a current bill of exchange or other debt payable in future was sufficient to support a petition<sup>1</sup>. This was changed by the Act of 1869, which permitted a creditor to petition when the "debt due" was "a liquidated sum due at law or in equity", which was interpreted to exclude a debt payable at a future date<sup>2</sup>. It was apparently to change this rule that the Act of 1883 enacted that the "debt owing" by the debtor might be a "liquidated sum payable either immediately or at some certain future time"<sup>3</sup>. It has been held on that Act that if a debtor who has given a bill of exchange for the price of goods sold, commits an act of bankruptcy, the creditor is entitled to treat the bill as dishonoured for the purpose of presenting a bankruptcy petition.<sup>4</sup>

And a liquidated sum.

The debt must be one payable to a particular person<sup>5</sup>, and must it seems be a liquidated sum<sup>6</sup> in existence prior to the act of bankruptcy on which the petition is founded<sup>7</sup>; though it need not have been due

<sup>1</sup> *Brett v. Levett* (1810), 13 East. 213, and see section 91 of the Act of 1849 (12 & 13 Vic. c. 106). Under *The Insolvent Acts* of 1864 and 1869, a "creditor of the insolvent" whose debt was not yet due, might petition: *Moore v. Luce* (1868), 18 U. C. C. P. 446; *In re Perks* (1870), 13 N. B. R. (2 Hannay) 121; see *R. v. Henry* (1891). 21 O. R. 113.

<sup>2</sup> *Ex parte Sturt in re Percy* (1871), L. R. 13 Eq. 309; 41 L. J. Bank. 12, a decision of Bacon, C.J.

<sup>3</sup> Section 6(1) (a) (b). The same words are in the English Act of 1914, section 4(1) (b), and were in the Bill of the present Act as passed by the House of Commons, but they were stricken out in the Senate.

<sup>4</sup> *Ex parte and in re Raatz* (1897), 2 Q. B. 80; 66 L. J. Q. B. 501; 4 Mans. 127. But the endorser of a discounted bill of exchange is not such a creditor of the acceptor that he can, because of his liability to pay the bill if the acceptor make default, present a bankruptcy petition against the acceptor: *In re Thomas* (1921), 1 C. B. R. 473; 20 O. W. N. 180 (Orde, J.).

<sup>5</sup> Where there is uncertainty who is to receive the sum, as in the case of damages recovered under *The English Divorce Act* against a co-respondent, this uncertainty may prevent any particular person from being a good petitioning creditor, though the debt may be a provable debt: *Ex parte and in re Muirhead* (1876), 2 Ch. D. 22; 45 L. J. Bank. 65, and see in the case of a contingent debt: *in re and ex parte Page* (1821), 1 Gl. & J. 100.

<sup>6</sup> *Ex parte and in re Broadhurst* (1853), 22 L. J. Bank. 21; 17 Jur. 964.

<sup>7</sup> *Ex parte and in re Hayward* (1871), L. R. 6 Ch. 546; 40 L. J. Bank. 49, where it was held that a bill of exchange issued after the act of bankruptcy was insufficient to support the petition; and see *Ex parte Charles* (1811), 14 East. 197. Where after the act of bankruptcy relied on, the creditor enters into an agreement to accept a cheque for



to the petitioning creditor himself before the act of bankruptcy relied on<sup>8</sup>. Section 4

A covenant that the debts of a firm do not exceed a specific sum, and if they do the defendant will pay the plaintiff on demand the sum by which the debts exceed the specific sum is a covenant for an unliquidated sum<sup>9</sup>. Where the remedy of the creditor is in damages for breach of an agreement there is no liquidated debt<sup>10</sup>. When at the time that an act of bankruptcy was committed the debtor was being sued for £49.11.7 debt and £3 costs; and after the act of bankruptcy judgment was signed for a total of £58.1.1 for debts and costs, and the plaintiff presented a bankruptcy petition; it was held that as there was not a petitioner's debt of £50 at the date of the act of bankruptcy no adjudication could be made<sup>1</sup>. In England it has been held that the costs of an abortive execution cannot be added to the judgment debt for the purpose of making up the amount of the debt required to support a petition; this on the ground that there the costs are recoverable only out of a particular fund, viz: the fruits of the particular execution, and the debtor is under no personal liability for them<sup>2</sup>; but interest may be added to a judgment debt<sup>3</sup>.

part of the judgment debt and the balance in instalments, the original debt is extinguished and a new contract is substituted for it, and it is no longer a good petitioning debt with respect to that act of bankruptcy: *In re a Debtor ex parte London & County Discount Co.* (1909), 16 Mans. 205; but if after the occurrence of the act of bankruptcy relied on, the creditor recovers judgment on a simple contract debt the judgment does not extinguish the debt for the purpose of bankruptcy proceedings so as to prevent the debt being available to support the petition. It seems that where the judgment has not been obtained at the date of the act of bankruptcy the better practice is to found the petition on the original debt: *Ex parte and in re King and Beesley* (1895), 1 Q. B. 189; 64 L. J. Q. B. 126; 1 Mans. 505.

<sup>8</sup> *Ex parte Cyrus in re Broadridge* (1869), L. R. 5 Ch. 176; 21 L. T. 664. The transfer of a bill of exchange after the act of bankruptcy, but before adjudication, makes the transferee a good petitioning creditor.

<sup>9</sup> *Walker v. Broadhurst* (1853), 23 L. J. Ex. 71.

<sup>10</sup> *In re Miller* (1901), 1 K. B. 51; 70 L. J. K. B. 1; 8 Mans. 1, a case depending on the construction of an agreement; and see *Ex parte Furber in re King* (1881), 17 Ch. D. 191, where the amount of the debt depended on the rate of interest which should be paid on the agreement.

<sup>1</sup> *Ex parte Sadler in re Whelan* (1879), 48 L. J. Bank. 43.

<sup>2</sup> *Ex parte Cuddeford in re Long* (1888), 20 Q. B. D. 316; 57 L. J. Q. B. 360; 5 Mor. 29.

<sup>3</sup> *In re Lehman ex parte Hasluck* (1890), 7 Mor. 181.



## Section 4

Purchase of  
a debt.

It is no objection to the petition that the creditor in order to found a petition upon it<sup>4</sup>, or to bring his debt up to the required amount, has made a *bona fide* purchase for value from another creditor of a claim against the insolvent<sup>5</sup>, so long as the debt is purchased for the purpose of better obtaining payment of his own debt and not for an illegitimate or collateral purpose<sup>6</sup>.

Act of  
bankruptcy  
within six  
months of  
the petition.

Unless the amendment of section 2(h) made by *The Bankruptcy Act Amendment Act* 1921 has made a change in the law, the act of bankruptcy on which the petition is grounded must have occurred within six months before the presentation of the petition. Certain acts of bankruptcy are continuing acts of bankruptcy<sup>7</sup>. In computing the period of six months the day on which the petition is filed is to be included<sup>8</sup>; but the day on which seizure is made under section 3(e) is excluded<sup>9</sup>. The petition may be presented on the same day as that on which the act of bankruptcy was committed<sup>10</sup>. Month means a calendar month<sup>1</sup>.

Proof of  
the debt.

The petitioning creditors ought to go to the hearing prepared to prove the material matters in the petition<sup>2</sup>. Oral evidence may be given to prove the continuance of the debt<sup>3</sup>, and the creditor may require production of the books of the debtor to prove the

<sup>4</sup> *In re and ex parte Baker* (1887), 5 Mor. 5.

<sup>5</sup> *Carrier v. Allin* (1877), 2 O. A. R. 15; *Glaister v. Hewer* (1797), 7 T. R. 498; *In re and ex parte Baker* (1887), 5 Mor. 5; and see *Ex parte Cyrus in re Broadridge* (1869), L. R. 5 Ch. 176; 21 L. T. 664.

<sup>6</sup> *Ex parte Harper in re Pooley* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; *Ex parte Griffin in re Adams* (1879), 12 Ch. D. 480; 48 L. J. Bank. 107; *Ex parte Gratton*, 2 M. D. & DeG. 401; *In re and ex parte Baker* (1887), 5 Mor. 5; and see *King v. Henderson* (1898) A. C. 720; 67 L. J. P. C. 134; 5 Mans. 308; and notes to section 4(6).

<sup>7</sup> See section 3(d), cf. 3(e); and see *In re Beeston* (1899), 1 Q. B. 626; 68 L. J. Q. B. 344; 6 Man. 27.

<sup>8</sup> *In re Hanson ex parte Forster* (1887), 4 Mor. 98.

<sup>9</sup> *Ex parte Hasluck in re North* (1895), 2 Q. B. 264; 64 L. J. Q. B. 694; 2 Mans. 326.

<sup>10</sup> *In re Haynes ex parte Kibble* (1890), 7 Mor. 50.

<sup>1</sup> R. S. C. 1906, c. 1, s. 35(16): *The Interpretation Act*.

<sup>2</sup> *Ex parte and in re Sanders* (1894), 63 L. J. Q. B. 734; 1 Mans. 382; *Ex parte and in re Rogers* (1880), 15 Ch. D. 207.

<sup>3</sup> *In re Stables ex parte Smith & Sons* (1894), 42 W. R. 448; 1 Mans. 68, and see section 68(6), and *supra* notes to section 4(2). As to release by order of discharge from joint and separate debts, see section 61(3).



allegations in the petition<sup>4</sup>. *Semble*, the creditor may call the debtor in support of the petition<sup>5</sup>; but he may not before the hearing of the petition examine the debtor for discovery<sup>6</sup>. The affidavit of verification<sup>7</sup> is to satisfy the Registrar of the performance of the conditions precedent to the sealing of the petition. When it has served that purpose it is so to speak dead. On an unopposed hearing the court may look at it; but it has been said that at an opposed hearing no reliance ought to be placed on it<sup>8</sup>.

If the court is not satisfied with the proof of the petitioning creditor's debt it may dismiss the petition. The court may at the instance of the debtor himself go behind a judgment and inquire into the validity of the debt, even though the debtor had previously applied in the action to have the judgment set aside and his application had been refused, and the refusal confirmed by the Court of Appeal<sup>9</sup>, for the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors<sup>10</sup>.

But a Court of Bankruptcy, after investigation of the proceedings leading up to judgment, has no jurisdiction to decide that there was no valid debt; the jurisdiction of the Court is limited to a discretion to refuse to make a receiving order<sup>1</sup>. The court will not as a matter of course or on the mere suggestion of the debtor<sup>2</sup> inquire into the validity of the judgment debt, but it will do so where there is evidence that

A judgment  
not conclu-  
sive.

<sup>4</sup> *In re X. Y. ex parte Haes* (1902), 1 K. B. 98; 71 L. J. K. B. 102; 8 Mans. 5.

<sup>5</sup> *In re X. Y. ex parte Haes, supra*.

<sup>6</sup> *In re a Debtor* (No. 7 of 1910), (1910), 2 K. B. 59; 79 L. J. K. B. 1065; 17 Mans. 263.

<sup>7</sup> See section 4(2).

<sup>8</sup> *Ex parte and in re Sanders* (1894), *supra*, and *In re Lindsay* (1874), L. R. 19 Eq. 52; 44 L. J. Bank. 5.

<sup>9</sup> *Ex parte Central Bank in re Fraser* (1892), 2 Q. B. 633; 9 Mor. 256.

<sup>10</sup> *Ex parte Kibble in re Onslow* (1875), L. R. 10 Ch. 373; 44 L. J. Bank. 63, judgment on a bill of exchange given by an infant. And see generally, *In re a Debtor ex parte Creditor* (1917), 2 K. B. 60; 86 L. J. K. B. 745; (1917), H. B. R. 123; *In re and ex parte Vitoria* (1894), 2 Q. B. 387; 63 L. J. N. B. 795; 1 Mans. 236.

<sup>1</sup> *Ex parte Lennox* (1886), 16 Q. B. D. 315; 55 L. J. Q. B. 45; 2 Mor. 271.

<sup>2</sup> *Ex parte Beyfus in re Saville* (1887), 4 Mor. 277.



**Section 4** the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice or that there is no good petitioning creditor's debt irrespective of the judgment<sup>3</sup>; or *semble*, that a compromise on which a judgment was based was unfair and unreasonable<sup>4</sup>. Therefore, the mere fact that an appeal is pending from the judgment will not be sufficient ground for staying the proceedings on the petition<sup>5</sup>. The power of the court to go behind a judgment is only a power to enquire into the consideration for, and not into the form of, the judgment<sup>6</sup>. Nor will the court question the discretion of another court in giving interest on the judgment<sup>7</sup>.

**Tender**

The court is justified in making a receiving order where the petitioning creditor has after the presentation of the petition refused to accept the debtor's tender of the debt and costs<sup>8</sup>, or where the petitioning creditor refuses to accept money paid into court by the debtor at the trial of the question of the validity of the debt<sup>9</sup>. But it may be that there are circumstances under which the court can refuse to make a receiving order after tender to the petitioning creditor<sup>10</sup>.

**Disputed debt.**

The court will not encourage an attempt by a creditor by means of a bankruptcy or winding-up petition to enforce payment of a debt which is *bona fide* disputed, but where the only dispute is as to amount and there is no question that the amount exceeds the

<sup>3</sup> *In re Flatau ex parte Scotch Whiskey Co.* (1888), 22 Q. B. D. 83; *In re Newey ex parte Whiteman* (1913), 107 L. T. 832; *Boaler v. Power* (1910), 2 K. B. 229; 79 L. J. K. B. 486; 17 Mans. 125; *In re a Debtor* (1915), 13 L. T. R. 704. See in the case of a default judgment *In re Turvey ex parte Lewis & Son, Lim.* (1918-1919), B. & C. R. 128.

<sup>4</sup> *In re Hawkins ex parte Troup* (1895), 1 Q. B. 404; 64 L. J. Q. B. 673; 2 Mans. 14.

<sup>5</sup> *In re Flatau ex parte Scotch Whiskey Co.* (1888), 22 Q. B. D. 83.

<sup>6</sup> *In re and ex parte Beauchamp* (1904), 1 K. B. 572; 73 L. J. K. B. 311; 11 Mans. 5; *In re Lykes, Jaram v. Holmes* (1909), 53 Sol. J. 267.

<sup>7</sup> *In re and ex parte Beauchamp, supra.*

<sup>8</sup> *Ex parte Brigstocke*, 4 Ch. D. 348; 46 L. J. Bank. 50.

<sup>9</sup> *In re Gentry* (1910), 1 K. B. 825; 79 L. J. K. B. 585; 17 Mans. 104.

<sup>10</sup> *Ex parte Brigstocke*, 4 Ch. D. 348, and see notes to section 4 (3) (a), under the side note "who may petition".



minimum required by the section, the court will no doubt make a receiving order<sup>11</sup>. Section 4

An accord and satisfaction given to one of two joint and several judgment debtors which releases him from the entire joint and several judgment debt will release the other judgment debtor<sup>1</sup>; but the rule of law that time given to a principal debtor discharges a surety does not apply when the time is given after a judgment for the debt has been recovered by the creditor against both the principal debtor and the surety<sup>2</sup>. Accord and satisfaction.

It is conceived that where an authorized assignment has been made and then a petition presented, it will have to be a strong case to satisfy the court that the estate can best be administered under the assignment, and to induce it to deny to the creditor his right to a receiving order<sup>3</sup>. Creditors under a receiving order occupy a much more favourable position than they do under an authorized assignment. In authorized assignments there is no relation back of the title of the trustee, such as takes place on the making of a receiving order<sup>4</sup>. Moreover in the case of a receiving order all the property of the debtor vests in the trustee, and this property includes not only property covered by the relation back of the trustee's title; but also all property which may be acquired by or devolve upon the bankrupt before his discharge<sup>5</sup>. There is no such provision in the case of an authorized

<sup>11</sup> See *In re Steel Ring Co.* (1920), 1 B. & C. R. 160; *Re Meaford Mfg. Co.* (1919), 46 O. L. R. 282 (Middleton, J.).

<sup>1</sup> *In re E. W. A. a Debtor* (1901), 2 K. B. 642; 70 L. J. K. B. 810; 8 Mans. 250; see as to the effect of a discharge in the case of joint contractors, section 61(3).

<sup>2</sup> *In re a Debtor* (1913), 3 K. B. 11, 14; 82 L. J. K. B. 907; 20 Mans. 119, and see *Ex parte Good in re Armitage* (1877), 5 Ch. D. 46; *In re Wolmershausen* (1890), 62 L. T. 541.

<sup>3</sup> Section 4(6) does not authorize the refusal of a receiving order where the debtor with the palpable intention of choosing his own trustee makes an authorized assignment after he is served with the petition and before the hearing, *per Orde, J.*, in *In re Croteau and Clark Co., Ltd.* (1920), 48 O. L. R. 359; 19 O. W. N. 199. In the case of a company there is much less prospect that the estates to be administered under a receiving order and under an assignment will differ. In the case of *Re Thomas Waterhouse & Co., Ltd.* (1921), 20 O. W. N. 298, the question of different estates does not appear to have been mentioned.

<sup>4</sup> See notes to sections 4(10), 63 and 25.

<sup>5</sup> Section 25.



**Section 4** assignment. It has been held in England not to be in itself a sufficient reason for refusing the receiving order<sup>6</sup>; that only one creditor with a substantial claim wishes the estate to go into bankruptcy; or that an unimpeachable assignment has been made<sup>7</sup>; nor is it conclusive that relatives will make a large money gift for the benefit of creditors if the estate is administered under the assignment, but that this money will not be available if a receiving order is made<sup>8</sup>.

"Other sufficient cause"

(a)  
No assets.

Although at the hearing of the petition there may be no assets for distribution among the creditors, this is not sufficient cause to justify the court in refusing to make a receiving order<sup>9</sup>, for property may be acquired by the debtor before his discharge<sup>10</sup>, and if no order is made the debtor may charge such property<sup>1</sup>; but if the court is clearly convinced<sup>2</sup>, not by

<sup>6</sup> *In re and ex parte Dixon* (1884), 13 Q. B. D. 118; 53 L. J. Ch. 769; 1 Mor. 98; *Ex parte Oram in re Watson* (1885), 15 Q. B. D. 399; 2 Mor. 99; *In re Scott ex parte Paris-Orleans Railway Co.* (1913), 58 Sol. J. 11. Under the English Act a receiving order is only a step toward the ultimate adjudication; but it is a first step, which will be followed by the second unless a composition or scheme is entered into. These decisions in bankruptcy are in accord with the decision of the present Chief Justice of Ontario in the winding-up case of *William Lamb Manufacturing Co.* (1900), 32 O. R. 243; distinguish *Wakefield Rat-tan Co. v. Hamilton Whip Co.* (1893), 24 O. R. 107; *In re Maple Leaf Dairy Co.* (1901), 2 O. L. R. 590. While a creditor is *prima facie* entitled to a receiving order where there are assets to be administered upon which the winding-up proceedings can attach with advantage or probable advantage, that is not the whole matter. Where under an assignment steps have already been taken to realize a large part of the assets, and there is no evidence that if a receiving order is made and the sale set aside there is any reasonable prospect of a larger amount being received by a new sale, a discretion exists under *The Winding-Up Act* to refuse the order: *In re The Strathy Wire Fence Co.* (1904), 8 O. L. R. 186, 193-195. See where the proceedings could be more expeditiously and inexpensively proceeded with under *The Provincial Act*: *In re Belding Lumber Co., Ltd.* (1911), 23 O. L. R. 255. Different considerations apply in the cases of individuals and companies. In the case of a company whose business is being wound up there is less likelihood than in the case of an individual that property will be acquired by the company before its "discharge".

<sup>7</sup> *In re Scott ex parte Paris-Orleans Railway Co.*, *supra*.

<sup>8</sup> *In re Scott ex parte Paris-Orleans Railway Co.* (1913), 58 Sol. J. 11.

<sup>9</sup> *Ex parte and in re Leonard* (1896) 1 Q. B. 473; 65 L. J. Q. B. 393; 3 Mans. 43.

<sup>10</sup> *In re Murrieta ex parte South American Co.* (1896), 3 Mans. 35; *In re Scott ex parte Paris-Orleans Railway Co.*, *supra*.

<sup>1</sup> *In re Belton* (1913), 108 L. T. 344.

<sup>2</sup> See *In re Hay* (1914), 110 L. T. 47.



the affidavit of the debtor, but by the facts of the case, that there are no assets, and will be none, as may be the case where there is a previous bankruptcy in existence under which the debtor is undischarged, there is sufficient ground for refusing to make the order<sup>3</sup>. Section 4

It is not ground for refusing to make a receiving order that the debtor's principal apparent asset will be thereby destroyed, *e.g.*, a life interest determinable on bankruptcy, unless it is proved to the satisfaction of the court that the asset in question is the sole asset. It is not enough to prove that it will probably be the sole asset<sup>4</sup>, and semble a voluntary promise by relatives and creditors to make a large money gift to the debtor if the estate is administered under the assignment is not an "asset"<sup>5</sup>. Nor is it sufficient cause for refusing to make the order that all the visible assets will be swallowed up by the costs of the bankruptcy petition<sup>6</sup>. (b)  
Destruction  
of assets.

It is no reason in England for refusing the application that the debtor is entitled to property not immediately available owing to an administration action in the Chancery Division of the High Court<sup>7</sup>. (c)  
Property not  
immediately  
available.

*Semble*, it is neither fraud nor an abuse of process for a creditor<sup>8</sup> to petition for a receiving order with an indirect motive, unconnected with the bankruptcy and not prejudicial to the equal distribution of the testator's assets, as for example to exclude the debtor (d)  
Indirect  
motive.

<sup>3</sup> *In re Betts* (1897), 1 Q. B. 50; 66 L. J. Q. B. 14; 3 Mans. 287, as explained in *In re Jubb ex parte Burman & Greenwood* (1897), 1 Q. B. 641; 66 L. J. Q. B. 452; 4 Mans. 30; *Ex parte and in re Robinson* (1883), 22 Ch. D. 816; *Ex parte Union Credit Bank in re Somers* (1897), 4 Mans. 227; see as to the discretion of the court in other cases: *In re and ex parte McCullough* (1880), 14 Ch. D. 716; *In re and ex parte Pinfold* (1892), 1 Q. B. 73; 61 L. J. Q. B. 161; 8 Mor. 312. In some cases "may" is to be read "must": *Julius v. Lord Bishop of Oxford* (1880) 5 A. C. 214. 241.

<sup>4</sup> *In re Birkin* (1896), 3 Mans. 291.

<sup>5</sup> *In re Scott ex parte Paris-Orleans Railway Co.*, *supra*.

<sup>6</sup> *In re Jubb ex parte Burman & Greenwood* (1897), 1 Q. B. 641; 66 L. J. Q. B. 452; 4 Mans. 30.

<sup>7</sup> *In re Whitley ex parte Mirfield Commercial Co.* (1891), 65 L. T. 351; 8 Mor. 149.

<sup>8</sup> See where the debtor himself procured the commission to issue: *Ex parte Harcourt* (1815), 2 Rose 203.



Section 4 from a partnership<sup>9</sup>. But the proceedings may not be used for an illegitimate and fraudulent purpose such as extorting money from the debtor<sup>10</sup>. It is an abuse of the bankruptcy law to purchase a debt due by the bankrupt in order to procure the appointment of a particular trustee; or for the purpose of making the debtor a bankrupt with a view not of recovering the debt, but of putting pressure on him for a collateral object or of injuring him in some way<sup>1</sup>; or for the purpose of threatening to make him a bankrupt in order to force him by that oppression to give up a just debt<sup>2</sup>.

The fact that the petitioning creditor, or one of two joint petitioning creditors<sup>3</sup>, has used or even attempted to use bankruptcy proceedings for the purposes of fraud or extortion, although the attempt may have failed, is sufficient cause for refusing to make a receiving order on the petition of that creditor<sup>4</sup>, even though there is a good petitioning creditor's debt, and an act of bankruptcy<sup>5</sup>. It is not necessary that the petition should actually have been presented at the time the fraud was attempted<sup>6</sup>. The question of extortion or fraud<sup>7</sup> is a question of fact which must depend on the circumstances of each case<sup>8</sup>. If there is nothing in the conduct of the petitioning creditor which would entitle the debtor to say that he has been imposed upon or subjected to extortion the court will not refuse to

<sup>9</sup> *King v. Henderson* (1898), A. C. 720; 67 L. J. P. C. 134; 5 Mansf. 308, and cases there reviewed.

<sup>10</sup> *In re Davies ex parte King* (1876), 3 Ch. D. 461; 45 L. J. Bank. 159.

<sup>1</sup> *Ex parte Harper in re Pooley* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810.

<sup>2</sup> *Ex parte Griffin in re Adams* (1879), 12 Ch. D. 480; 48 L. J. Bank. 107.

<sup>3</sup> *In re Shaw ex parte Gill* (1901), 83 L. T. 754.

<sup>4</sup> *In re Shaw ex parte Gill* (1901), 83 L. T. 754; *In re Davies ex parte King* (1876), 3 Ch. D. 461; 45 L. J. Bank. 159; *Ex parte Griffin in re Adams* (1879), 12 Ch. D. 480; 48 L. J. Bank. 107; *Ex parte Harper in re Pooley* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810.

<sup>5</sup> *Ex parte and in re Atkinson* (1892), 9 Mor. 193; *Re Otway* (1895), 1 Q. B. 812; 64 L. J. Q. B. 521; 2 Man. 174.

<sup>6</sup> *Re Shaw ex parte Gill* (1901), 83 L. T. 754.

<sup>7</sup> *In re Sunderland ex parte Leech & Simplinson* (1911), 2 K. B. 658, 663; 80 L. J. K. B. 825; 18 Man. 123.

<sup>8</sup> *Ex parte and in re Bebro* (1900), 2 Q. B. 316; 69 L. J. Q. B. 618; 7 Mans. 284.



make the order<sup>8</sup>; and where there is no attempt to make a secret arrangement with the debtor, but an open insisting on legal rights, there is no fraud<sup>10</sup>.

Section 4

The fact that the debtor has only one creditor will not necessarily be a sufficient reason for refusing to make a receiving order<sup>1</sup>, particularly when he is a creditor for a large amount<sup>2</sup>.

(c)  
Only one  
creditor.

A surety may be made bankrupt though the creditor holds security from the principal debtor which he has not realized<sup>3</sup>.

(d)  
Surety.

Where a creditor whose debt evidenced by notes payable in two, three, four, five, six, seven, eight and nine years, presented a petition under the Act of 1864, and it was shown that the debtor did not owe more than \$100.00 beyond the debt due the creditor, the court acting under the powers conferred by that Act directed that the debtor should have further time to show if he could that he was not insolvent, and so not liable to have his estate placed in compulsory liquidation<sup>4</sup>.

(e)  
Debts not  
yet due.

A decision of a Registrar not to make a receiving order is not *res judicata* which will prevent the same creditor from petitioning anew upon the same judgment in a proper case<sup>5</sup>, although if after such a refusal the creditor presents another petition founded on the same debt and the same act of bankruptcy, a receiving order may be refused if the proceedings are vexatious. Such was the case where a petitioning creditor failed to prove separate trading of a married woman, and, his petition having been dismissed, he presented a fresh joint petition by himself and another creditor founded

(h)  
Previous  
application  
for a  
receiving  
order  
refused.

<sup>8</sup>*Ex parte and in re Bebro* (1900), 2 Q. B. 316; 69 L. J. Q. B. 618; 7 Mans. 284; *In re Hay* (1914), 110 L. T. 47.

<sup>10</sup>*In re Sunderland ex parte Leech & Simpkinson* (1911), 2 K. B. 658, 663; 80 L. J. K. B. 825; 18 Mans. 123.

<sup>1</sup>*In re Hecguard* (1889), 24 Q. B. D. 71; 6 Mor. 282.

<sup>2</sup>*In re Scott ex parte Paris-Orleans Railway Co.* (1913), 58 Sol. J. 11, and see *William Lamb Manufacturing Co.* (1900), 32 O. R. 243.

<sup>3</sup>*In re Hodges ex parte Matthews* (1896), 3 Mans. 329; and see *Hutchins v. Cohen* (1869), 14 L. C. J. 85; and notes to 2(gg) "secured creditor"

<sup>4</sup>*In re Moore ex parte Luce* (1868), 18 U. C. C. P. 446.

<sup>5</sup>*Ex parte and in re Vitoria* (1894), 2 Q. B. 387; 63 L. J. Q. B. 795; 1 Mans. 236; *King v. Henderson* (1898), A. C. 720, 730; 67 L. J. P. C. 134; 5 Mans. 308.



**Section 4** so far as the first petitioner was concerned on the same debt and the same act of bankruptcy<sup>6</sup>.

Effect of  
receiving  
order and  
adjudication.

A distinction exists between the making of a receiving order and an adjudication of bankruptcy<sup>7</sup>. In England when the petition is heard no adjudication takes place, but a receiving order is made for the protection of the estate<sup>8</sup>. Thereupon meetings of creditors take place, the public examination of a debtor is conducted and proposals for composition are discussed. If the negotiations for composition come to naught the case comes again before the court, and the debtor is adjudicated bankrupt<sup>9</sup>. In the interim between the making of the receiving order and the adjudication the debtor is the only person who can sue for the recovery of what belongs to him. Unless and until he becomes bankrupt, what he recovers is his property, both legally and equitably, though he must hand it over when he recovers it, to the trustee<sup>10</sup>. It is the adjudication and not the receiving order which vests in the trustee the property of the debtor<sup>1</sup>. With us on the other hand, it is the receiving order which vests the property of the debtor in the trustee<sup>2</sup>, and the adjudication does little more than attach the label of bankrupt to the debtor. As to whether the adjudication and the making of the receiving order are judicial acts which date from the earliest minute of the day on which they are done, see *R. v. Edwards*<sup>3</sup>.

<sup>6</sup> *In re Larard ex parte Yeomans & Heap* (1896), 3 Mans. 317.

<sup>7</sup> See as to the effect of a receiving order 6(1) (3). The distinction between a receiving order and an adjudication does not appear to have been kept distinct in section 77(4).

<sup>8</sup> Section 3.

<sup>9</sup> Section 18.

<sup>10</sup> *Rhodes v. Dawson* (1886), 16 Q. B. D. 554; 55 L. J. Q. B. 134, and see *Ex parte Postmaster-General in re Bonham* (1879), 10 Ch. D. 595; 48 L. J. Bank. 84; *In re Berry, Duffield v. Williams* (1896), 1 Ch. 939; 65 L. J. Ch. 245; 3 Mans. 11.

<sup>1</sup> English Act, 1914, s. 18.

<sup>2</sup> Sections 6(3), 25. As to the extra-territorial effect of the making of the receiving order, see notes to 2(*dd*), and see Vol. III. Foreign Judgments and Jurisdiction, Piggott, 1910, Butterworth & Co.

<sup>3</sup> (1854), 9 Ex. 628; *Wright v. Mills* (1859), 28 L. J. Ex. 223, and compare as to non-judicial acts; *Ex parte and in re Richardson* (1838), 3 Deacon 496, 506. See generally *Converse v. Michie* (1865), 16 U. C. C. P. 167; *Whyte v. Treadwell* (1867), 17 U. C. C. P. 488; and see *per Wright, J.*, in *In re and ex parte Pollard* (1903), 2 K. B. 41; 72 L. J. K. B. 509; 10 Mans. 152.



Where proceedings are stayed under section 4(7), Section 4  
 security should not, as a general rule, be required for Where pro-  
 an amount greater than that of the debt on which the ceedings are  
 petition is founded; but under special circumstances stayed under  
 security for a greater amount can be required<sup>4</sup>. section 4(7).

Where the court has ordered security to be given within a limited time, and the debtor neglects to give the security, the court should not adjudge the debtor a bankrupt without first going into the account and ascertaining whether there was a debt sufficient to support the adjudication<sup>5</sup>.

Where an order is made for a stay of proceedings under this sub-section, and on the trial of the question of the validity of the debt, the debtor admits the debt and pays the amount of the debt and costs into court, the petitioning creditor is not bound to accept payment of the debt by taking the money out of court, but may proceed with the petition<sup>6</sup>.

Leave to withdraw a creditor's petition should not be given without the court being first informed of the facts of the case and the proposed terms of withdrawal, so that it may exercise its judgment as to whether the case is a proper one for allowing a withdrawal<sup>7</sup>. Withdrawal  
of petition  
under sec-  
tion 4 (9).

It is difficult to see what is intended by section 4(10)<sup>8</sup>. Under *The Bankruptcy Act* the relation back of the bankruptcy of the debtor is of little importance; it is the relation back of the title of the trustee which is important. The corresponding section in the English Act is intelligible, for under that enactment the adjudication of bankruptcy vests the property of the debtor in the trustee. Under our Act, it is the making of the receiving order which does this<sup>9</sup>. Reading sections 6(3) and 25 of the Canadian Act together it is Distinction  
between the  
relation back  
of the bank-  
ruptcy of the  
debtor; and  
the relation  
back of the  
title of the  
trustee.

<sup>4</sup> *Ex parte and in re Evans* (1884), 50 L. T. 158.

<sup>5</sup> *Ex parte and in re Harris* (1875), L. R. 10 Ch. 264.

<sup>6</sup> *In re Gentry ex parte O. R.* (1910), 1 K. B. 825; 79 L. J. K. B. 585; 17 Mans. 104.

<sup>7</sup> *In re Bebro* (1900), 2 Q. B. 316; 69 L. J. Q. B. 618; 7 Mans. 284.

<sup>8</sup> See, however, sections 29 and 30.

<sup>9</sup> Compare English Act, sections 31(1), 7(1), 18(1), 53(1), 38, with Canadian Act, 4(10), 6(1), 6(3), 25.



## Section 4

Relation  
back of title  
of the  
trustee.

clear that the title of the trustee relates back to the date of the presentation of the bankruptcy petition<sup>10</sup>.

Although section 4(10) does not treat of the relation back of the title of the trustee, it is convenient here to discuss that cognate and important subject.

In England the bankruptcy of the debtor is deemed to have relation back to and to commence at the time at which the act of bankruptcy was committed, on which a receiving order is made against him; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition<sup>1</sup>.

The relation back of the title of the trustee affects transactions by or with the debtor after the commencement of his bankruptcy. After that date the bankrupt is deemed to have had no title; and no power to convey or charge what had been his property, or to give receipts for moneys paid to him, or discharges for debts due him. Nor is a trustee asserting his title by relation back estopped by any representation made by the bankrupt after the date to which the title relates back<sup>2</sup>.

Severity of  
the doctrine  
is mitigated  
by section 32  
and two rules  
followed  
by the  
Court.

The severity of the doctrine of relation back is mitigated by section 32, and by two rules applied by the court. The first rule is that the court will not permit its

<sup>10</sup> Compare *Dominion Winding-Up Act*, R. S. C. 1906, c. 144, s. 5: *Fuches v. Hamilton Tribune* (1884), 10 P. R. 409; *Bank of Hamilton v. Cramer Irwin* (1912), 1 D. L. R. 475; and *The English Companies Act* of 1862, s. 84. Under *The Canadian Bankruptcy Act* of 1864, the title of the trustee took effect at the date of the issuing of the writ of attachment: *Thorne v. Torrance* (1866), 16 U. C. C. P. 445; 18 U. C. C. P. 29. See also the curious wording of sections 29(2) and 30, where the "date of the petition" is the phrase used. As to what is meant by the "date of the presentation of the petition", see notes to section 76.

<sup>1</sup> (1914), 4 & 5 Geo. V. c. 59, s. 37(1).

<sup>2</sup> *In re and ex parte Salaman* (1912), 1 K. B. 309; 81 L. J. K. B. 360; 19 Mans. 49; *In re Evans ex parte Salaman* (1916), 2 H. B. R. 111; and see generally *In re Gunsbourg* (No. 3), (1920), 2 K. B. 426; 89 L. J. K. B. 725. A trustee may be estopped from impeaching a transaction by conduct of the debtor prior to the date to which his title relates back: *Madell v. Thomas & Co.* (1891), 1 Q. B. 230, 238; 60 L. J. Q. B. 227; *In re and ex parte Salaman*, *supra*; *In re Evans ex parte Salaman*, *supra*.



officer to insist on a rule of law or equity in the administration of the estate where insistence would produce an unjust and dishonest result<sup>3</sup>. The second rule is that a trustee in bankruptcy may in the exercise of his discretion adopt and pay for services rendered to a bankrupt after notice of an act of bankruptcy when such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the services rendered; but the trustee must be very strict in the application of the rule<sup>4</sup>.

## Section 4

After the presentation of a petition against him a debtor who has committed an available act of bankruptcy is something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed, either by the making of a receiving order or the dismissal of the petition, he has no right to deal with those assets that are in his hands; and can give no title in them to any transferee who has notice of an available act of bankruptcy. Thus the debtor cannot pay an accountant for past services<sup>5</sup>, and the debtor's trustee in bankruptcy can recover from a bookmaker moneys paid by the bankrupt in satisfaction of a gaming debt void by statute<sup>6</sup>. Similarly with regard to the debts and other choses in action which form part of his estate, he cannot collect them or give a valid discharge for them; and anyone making payment to him with notice of the act of bankruptcy does so at his peril. But these provisions are for the benefit of the bankrupt, not

Incapacity  
of debtor.

Right of  
debtor  
to sue.

<sup>3</sup> *In re Thellusson ex parte Abdy* (1919), 2 K. B. 735; *In re Tyler ex parte O. R.* (1907), 1 K. B. 865; 76 L. J. K. B. 541; 14 Mans. 73; *Ex parte Simmonds in re Carnac* (1885), 16 Q. B. D. 308; 55 L. J. Q. B. 74; *Ex parte James in re Condon* (1874), L. R. 9 Ch. 609; 43 L. J. Bank 107; distinguish *In re Stokes ex parte Mellish* (1919), 2 K. B. 256; *In re Phillips ex parte O. R.* (1914), 2 K. B. 689; 83 L. J. K. B. 1316; 21 Man. 144; *Tapster v. Ward* (1909), 101 L. T. 25, 503; *In re Hall ex parte O. R.* (1907), 1 K. B. 875; 76 L. J. K. B. 546; 14 Mans. 82.

<sup>4</sup> *Ex parte Ball in re Simonson* (1894), 1 Q. B. 433; 63 L. J. Q. B. 242; 1 Man. 30.

<sup>5</sup> *In re White ex parte Ward* (1898), 5 Mans. 17; but in some cases he can pay a solicitor for future services: *In re Sinclair ex parte Payne* (1885), 15 Q. B. D. 616; 2 Mor. 255. See *infra*, p. 145.

<sup>6</sup> *Ward v. Fry* (1901), 85 L. T. 394. See as to incapacity of payee of a promissory note to endorse it after the making of a receiving order: *Jenks v. Doran* (1880), 5 O. A. R. 558.



**Section 4** for the advantage of his debtors, consequently notice of an act of bankruptcy is not a defence to an action otherwise well founded. It does not follow that the consequence of a judgment in favour of the insolvent plaintiff ought to be that the money recovered is paid to the plaintiff. The right course for the court to pursue after notice of an act of bankruptcy and of service of a petition on the insolvent would seem to be to direct the money recovered from the defendant to be kept in court until it shall be seen whether the person entitled to it is the insolvent plaintiff or the representative of his estate<sup>7</sup>. *Semble*, a defendant who immediately after action is commenced brings the money into court and states the facts which demonstrate the impossibility of making tender, is entitled to his costs of the action<sup>8</sup>.

**Costs.**

Position of  
agents of the  
debtor.

As what had been the property of the debtor is by reason of the relation back of the title of the trustee, deemed not to have been his, any trustee or agent of the debtor or any person such as a debenture holder<sup>9</sup>, who has meddled with the property after the date to which the title of the trustee relates back, will be in the position of a trustee *de son tort*<sup>10</sup>.

Appropriation for past  
services.

But where solicitors have moneys on hand with authority to use them to pay their own costs and those of others employed by them for the debtor, they may, after notice of an act of bankruptcy, appropriate those moneys or a portion of them, as the case may be, not only to cover their own services rendered before notice of the act of bankruptcy, but also to pay others such as accountants to whom they had incurred liability on behalf of the debtor before notice of the act of bankruptcy<sup>11</sup>.

<sup>7</sup> *Ponsford Baker & Co. v. Union of London Bank* (1906), 2 Ch. 444; 75 L. J. Ch. 724; 13 Mans. 321.

<sup>8</sup> *McCarthy v. Capital & County's Bank* (1911), 2 K. B. 1088; 81 L. J. K. B. 14; 18 Mans. 343.

<sup>9</sup> *In re Goldberg ex parte Page* (1912), 1 K. B. 606; 81 L. J. K. B. 663; 19 Mans. 138.

<sup>10</sup> A trustee under an authorized assignment might even find himself in this position. See section 3(a) and *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344, and see notes to 6(3).

<sup>11</sup> *In re Whitlock ex parte O. R.* (1894), 63 L. J. K. B. 245; 1 Mans. 33.



On the other hand neither solicitors, accountants nor trustees can, after knowledge of an act of bankruptcy, and while there is any prospect of the relation back of the title of the trustee in bankruptcy, safely pay out assets in their hands the property of the bankrupt for work performed *after* notice of an act of bankruptcy<sup>12</sup>.

Section 4

Payment out for future services.

With respect to retainer by a solicitor of moneys paid to him or in his hands for services rendered to the debtor after the commencement of the title of the trustee, and after notice of an act of bankruptcy certain nice distinctions arise. It was decided in *In re Sinclair ex parte Payne*<sup>13</sup>, that money *bona fide* paid by a debtor to his solicitor to defray counsel's fees and other legal expenses in opposing proceedings in bankruptcy that have been commenced against him, cannot, should adjudication follow, be recovered from the solicitor by the trustee, even although the solicitor knew of the acts of bankruptcy on which the proceedings were based. This case only applies to ready money which is paid over, and has no application to moneys or the proceeds of property which happen to be in the hands of a solicitor<sup>1</sup>. The other current of authority is indicated by the case of *In re Pollitt ex parte Minor*<sup>2</sup>. In that case a debtor consulted a solicitor to whom he was already indebted for costs, and the solicitor declined to act further unless he were furnished with money to meet future costs. The debtor placed money in his hands for that purpose, and the solicitor did further work for the debtor, in the course of which he became aware of an act of bankruptcy. It was there held that at the moment when the title of

Appropriation or receipt for future services.

<sup>12</sup> *In re Forster ex parte Rawlings* (1887), 4 Mor. 292; *Ex parte Ball in re Simonson* (1894), 1 Q. B. 433; 63 L. J. Q. B. 242; 1 Mans. 30.

<sup>13</sup> (1885), 15 Q. B. D. 616, and see *In re Johnson ex parte Ellis* (1914), 111 L. T. 165.

<sup>1</sup> *Ex parte May in re Spackman* (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 306; 7 Mor. 100; *In re Whitlock ex parte O. R.* (1894), 63 L. J. K. B. 245; 1 Mans. 33; *In re Simonson ex parte Ball* (1894), 1 Q. B. 433; 63 L. J. Q. B. 242; 1 Mans. 30.

<sup>2</sup> (1893), 1 Q. B. 455; 62 L. J. Q. B. 236; 10 Mor. 35; and see *In re Mander ex parte O. R.* (1902), 86 L. T. 234.



**Section 4** the trustee commenced the solicitor could not do any more work for the bankrupt as against the money he then had in hand; and he was ordered to pay over to the trustee the moneys which he claimed to be entitled to retain in respect of professional services rendered after the commencement of the title of the trustee. This case was distinguished in *In re Charlwood ex parte Masters*<sup>3</sup>, where a lump sum was paid under a contract for definite services; but to be within the rule of *In re Charlwood* the sum must be irrevocably appropriated to the services; and not be security for costs only<sup>4</sup>.

Dealings  
with trustee  
de son tort.

Any debtor of the bankrupt who pays his debt to a trustee *de son tort* is liable to be made to pay over again to the trustee in bankruptcy. He can only avoid paying by proof that the trustee *de son tort* has paid the moneys to the trustee in bankruptcy<sup>5</sup>. The trustee must elect whether he will treat a trustee *de son tort* as a trespasser or as his agent<sup>6</sup>.

Repayment.

Persons such as petitioning creditors who receive moneys, the property of the debtor, to which the title of the trustee relates, may be required to pay them over to the trustee; even though these moneys were advanced by third parties to the solicitors of the debtor for payment over to the petitioning creditor<sup>7</sup>, and even though the debtor in paying the money falsely represented it not to be his, but the property of a third party<sup>8</sup>. A solicitor or other agent who with knowledge of an act of bankruptcy has paid over such moneys to petitioning creditors or other persons may also be

<sup>3</sup> (1894), 1 Q. B. 643; 63 L. J. Q. B. 344; 1 Mans. 42.

<sup>4</sup> *In re Beyts & Craig ex parte Cooper* (1894), 1 Mans. 56.

<sup>5</sup> *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344.

<sup>6</sup> *Ex parte Vaughan in re Riddeough* (1884), 14 Q. B. D. 25; 1 Mor. 258; *In re Richards ex parte O. R.* (1884), 1 Mor. 242; *In re Goldberg ex parte Page* (1912), 1 K. B. 606; 81 L. J. K. B. 663; 19 Mans. 138; *In re Prigoshen ex parte O. R.* (1912), 2 K. B. 494; 81 L. J. K. B. 1199; 19 Mans. 323; *Davis v. Petrie*, *supra*; and see notes to section 25.

<sup>7</sup> *In re Snyder ex parte Pixley* (1891), 8 Mor. 127.

<sup>8</sup> *In re Ashwell ex parte Salaman* (1912), 1 K. B. 390; 81 L. J. K. B. 360; 19 Mans. 49. And see *In re Evans ex parte Salaman* (1916), H. B. R. 111.



ordered to pay the moneys over again to the trustee<sup>9</sup>; Section 4  
 but where such moneys are advanced by third parties impressed with a trust for payment to certain creditors, and never become the property of the debtor, the trustee is not entitled to demand repayment<sup>10</sup>. It is on the same principle that where creditors have notice of an act of bankruptcy and receive money to pay a debt for the incurring of which they then were conducting criminal proceedings before a magistrate, the trustee in bankruptcy, if his title relates back to cover the transaction, can recover back the money if it was in fact the money of the debtor though accepted by the creditors under the belief that it was the money of a relative of the debtor<sup>1</sup>. But where without notice of an act of bankruptcy payment is made under the sanction of a proper authority, such as a garnishee order made absolute, it will be protected<sup>2</sup>, and it may be that a payment made under compulsion of immediate execution will even after knowledge of an act of bankruptcy be protected<sup>3</sup>. But where to the knowledge of the garnishee a receiver has been appointed, and there is no compulsion or threat of execution, the payment will not be protected<sup>4</sup>, and a debtor of the bankrupt, who without knowledge of an act of bankruptcy by the bankrupt, and before the garnishee order was made absolute, paid over his debt to a judgment-creditor of the bankrupt who had obtained a garnishee order *nisi*, will be ordered to pay the money over again to the trustee; for even in a suit at law it would have been no defence to have alleged that the debt had been paid

<sup>9</sup> *Ex parte Edwards in re Chapman* (1884), 13 Q. B. D. 747; 1 Mor. 238; but the solicitor on being sued by the trustee may have leave, on giving proper indemnity, to use the name of the trustee in his suit to recover the moneys from the persons to whom he paid them over: *In re Jackson ex parte Hogan & Hughes* (1891), 8 Mor. 172.

<sup>10</sup> *In re Rogers ex parte Holland & Hannen* (1891), 8 Mor. 243; *In re Drucker ex parte Basden* (1902), 2 K. B. 237; 71 L. J. K. B. 686, 9 Mans. 237.

<sup>1</sup> *Ex parte Wolverhampton & Staffordshire Banking Co. in re Campbell* (1884), 14 Q. B. D. 32; 1 Mor. 261. Distinguish *Ex parte Caldecott in re Mapleback* (1876), 4 Ch. D. 150, where the title of the trustee did not relate back.

<sup>2</sup> *Wood v. Dunn* (1866), L. R. 2 Q. B. 73; 36 L. J. Q. B. 27.

<sup>3</sup> *Turnbull v. Robertson* (1878), 47 L. J. C. P. 294; 38 L. T. 389.

<sup>4</sup> *Stuart v. Grough* (1888), 15 O. A. R. 299.



**Section 4** over to a garnishing creditor before the garnishee order was made absolute<sup>5</sup>.

Payments made after notice of an act of bankruptcy by secured creditors to other creditors can not be added to their mortgage security<sup>6</sup>.

Adjudication  
conclusive.

By virtue of this sub-section and of section 77(4) the adjudication so long as it stands is conclusive against a third person that the act of bankruptcy on which the adjudication was professedly founded was in fact committed<sup>7</sup>.

Estoppel of  
trustee.

The trustee steps into the shoes of the bankrupt at the date when his (the trustee's) title begins. He is therefore liable to be met by the defences with which the bankrupt could be met; and estoppel is one of these. But after the date when his title commences the conduct of the bankrupt in purporting to deal with what formerly was his property cannot estop the trustee<sup>8</sup>, unless there is some holding out of the bankrupt by the trustee as his agent.

Rights of  
secured  
creditors.

The rights of a secured creditor may be affected by the relation back of the title of the trustee; for a secured creditor who has notice of an available act of bankruptcy cannot safely receive payment from his debtor, and consequently the debtor cannot at least after the presentation of a petition<sup>9</sup>, make a good tender to him and require him to give up his securities in payment of the amount due<sup>10</sup>.

Section 4(11) was enacted for the first time by section 5 of *The Bankruptcy Act Amendment Act, 1920*.

Proceedings  
taken in  
wrong  
court.

Where the petition is inadvertently and not wilfully presented in the wrong court, the court, it seems, may hear the petition, and make a receiving order,

<sup>5</sup> *In re Webster ex parte O. R.* (1907), 1 K. B. 623; 14 Mans. 20.

<sup>6</sup> *In re Hall ex parte O. R.* (1907), 1 K. B. 875; 76 L. J. K. B. 546; 14 Mans. 82.

<sup>7</sup> *Ex parte Learoyd in re Foulds* (1878), 10 Ch. D. 3; 48 L. J. Bank. 17; and see section 77(4). Form No. 14 provides that 'the date of the filing of the petition shall be mentioned in the order.'

<sup>8</sup> *In re Ashwell ex parte Salaman* (1912), 1 K. B. 390; 81 L. J. K. B. 360; 19 Mans. 49; *In re Evans ex parte Salaman* (1916), H. B. R. 111. See further as to the position of the trustee in Chapter VI.

<sup>9</sup> See 6(3), 25.

<sup>10</sup> *Ponsford Baker & Co. v. Union of London Bank* (1906), 2 Ch. 444; 75 L. J. Ch. 724; 13 Mans. 321.



and may then invoke the power contained in section 6(4), and transfer the proceedings to the proper court<sup>1</sup>. If the court refuses to make the order it may be made on appeal<sup>2</sup>. Where a petition was presented in the wrong court and adjourned from time to time at the convenience of a petitioning creditor, and later another petition was presented in the proper court, and receiving orders made on both petitions on the same day, the receiving order in the wrong court being made first in point of time, a Divisional Court in England refused to set aside the second receiving order, leaving it open for an application to be made to the court in which the first receiving order had been made to stay proceedings there<sup>3</sup>. *Semble*, if a man leaves the jurisdiction of a court in order to avoid its process, its jurisdiction over him continues<sup>4</sup>.

Section 5

### *Interim Receiver.*

5. The court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint an authorized trustee as interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof. Interim receiver may be appointed.
- (2) The said interim receiver may, under the direction of the court, summarily dispose of any perishable goods and carry on the business of the debtor for all conservatory purposes. Powers of interim receiver

<sup>1</sup> *Ex parte May in re Brightmore* (1884), 14 Q. B. D. 37; 1 Mor. 253; *In re and ex parte French* (1889), 24 Q. B. D. 63; 6 Mor. 258; *Revell v. Blake* (1873), L. R. 8 C. P. 533; 42 L. J. C. P. 195; *In re Buckland* (1873), L. R. 15 Eq. 221.

<sup>2</sup> *Ex parte May in re Brightmore* (1884), 14 Q. B. D. 37; 1 Mor. 253; and see *Ex parte Soanes in re Walker* (1884), 13 Q. B. D. 484; 1 Mor. 193.

<sup>3</sup> *In re Strick ex parte Martin* (1886), 3 Mor. 78.

<sup>4</sup> *In re Williams* (1873) L. R. 8 Ch. 690; 42 L. J. Bank. 28; *Ex parte North Kent Bank in re Holdsworth* (1878), L. R. 9 Ch. D. 333; 47 L. J. Bank. 119.



**Section 5** **Cross References Act:** Receiving order, 4(5); effect of, 6(1)(3); carrying on the business, 13(3b), 20(1)(b), 27.

**Cross References Rules:** Appointment of interim receiver, 85; damages if petition dismissed, 86.

**Cross References Forms:** Order appointing interim receiver, 15.

**Analogous Legislation:** English Acts, 1914, s. 8; 1883, s. 10(1).

Section 5(2) was added by section 8 of *The Bankruptcy Act Amendment Act 1921*.

An order appointing an interim receiver does not effect a transfer of the estate, but it terminates the power of the debtor to charge or deal with his property<sup>5</sup>. The interim receiver is very much in the same position, and appointed for the same purpose, as the official receiver in England; although the English Act also provides for the appointment of an interim receiver. The object of his appointment is simply the protection of the estate<sup>6</sup>. An interim receiver should not realize the debtor's property or deal with or encumber it except when it is necessary to do so for the protection or preservation of the property<sup>7</sup>. When an interim receiver has been appointed and the petition is afterwards dismissed on the ground that the alleged debtor is not a debtor within section 2(o), the interim receiver is not a trespasser or wrong-doer; for the court has jurisdiction over the subject-matter, and the order, though erroneous, is not without jurisdiction altogether<sup>8</sup>. Where an interim receiver is appointed the three months wages to which priority is given by section 51(1), will be reckoned from the date of the appointment of the interim receiver, and not from the actual date of the receiving order<sup>9</sup>.

The court will not, by the appointment of an interim

<sup>5</sup> *In re Wells & Croft ex parte O. R.* (1894), 72 L. T. 359; 2 Mans. 41.

<sup>6</sup> *In re Berry, Duffield v. Williams* (1896), 1 Ch. 939; 65 L. J. Ch. 245; 3 Mans. 11. As to whether he can "represent the estate": see *Smith v. McMillan* (1879), 26 Grant 300.

<sup>7</sup> *In re Wells & Croft ex parte O. R.* (1894), 72 L. T. 359; 2 Mans. 41.

<sup>8</sup> *In re A. B. & Co.* (No. 2), (1900), 2 Q. B. 429; 69 L. J. Q. B. 568; 7 Mans. 268.

<sup>9</sup> *In re Smith ex parte Trustee* (1886), 17 Q. B. D. 4; 55 L. J. Q. B. 288; 3 Mor. 63.



receiver, interfere with the possession of a secured creditor on the mere suggestion that a case may be found for impeaching the validity of the security<sup>10</sup>. Section 6

Where a strong *prima facie* case of bankruptcy is made out and acts are shown which point to the necessity for the protection of the estate, the court will appoint an interim receiver<sup>11</sup>. After an interim receiver has been appointed the court may on his application restrain an authorized trustee who has been appointed trustee on the petition of another creditor from proceeding with the sale of the property<sup>12</sup>.

### *Trustee under Receiving Order.*

- 6 (1) On the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose. But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed. Receiving order shall vest property in trustee.
- (2) The court may constitute as such receiver the trustee named in the petition or some other authorized trustee acting for or within the same bankruptcy district as such named Selection of trustee.

<sup>10</sup> *Ex parte Bayly in re Hart* (1880), 15 Ch. D. 223.

<sup>11</sup> *In re Rosenstein* (1921), 1 C. B. R. 393 (Panneton, J.). An interim receiver has been appointed after petition filed where the debtor having abandoned his place of business service on him has been impossible, it being shown to be in the interest of creditors that an interim receiver be appointed: *In re Xenos* (1921), 1 C. B. R. 470.

<sup>12</sup> *In re Bonneville & Hollander* (1921), 1 C. B. R. 378 (Panneton, J.).



Section 6

Property of  
debtor  
vested in  
trustee.

Transfer of  
proceedings  
to another  
division.

Order to  
proceed in  
same court.

trustee, having regard as far as the court deems just to the wishes of the creditors as proved by any sufficient evidence.

- (3) On a receiving order being made against a debtor the property of the debtor shall forthwith pass to and vest in the trustee named therein and in any case of change of trustee, shall pass from trustee to trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.
- (4) The court, upon the application of the trustee or of a creditor proceeding under authority of an ordinary resolution carried by the votes of a majority in number of the known creditors, and upon satisfactory proof that the affairs of the debtor can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may at any time by order, transfer any proceedings under this Act which are pending before it to another bankruptcy district or division wherein thereafter they may be carried on as effectually as if therein commenced, or the court in which any such proceedings were commenced may of itself, for like cause upon satisfactory proof that such proceedings were commenced in good faith and not for the purpose of attempting to vest authority over the estate involved in any particular authorized trustee or in the authorized trustee acting for or within any bankruptcy district, and provided that such proceedings were commenced within the province of the debtor's locality, order that such proceedings be retained in the bankruptcy district or division in which they were commenced, although the court so ordering may not be the court in which the proceedings ought to have been commenced.



**Cross References Act:** Trustee to be in the same position as receiver, 17(2); rights of trustee as regards property pledged, 22(2); property vesting in trustee on making of R. O., 6(3), 25; debts provable in bankruptcy, 44; making of receiving order, 4(5); proceedings by creditor where trustee refuses to act, 35; secured creditor defined, 2(*gg*); rights of secured creditors in case of authorized assignment, 10; secured creditors generally, 42(10), 46; appointment of trustee, 14; relation back of title of trustee, 6(3), 25, *cf.* 4(10); proceedings commenced in wrong court, 4(11), *cf.* 4(4); courts to be auxiliary to each other, 71(2); stay of proceedings, 7, 13A.

**Cross References Rules:** Transfer of proceedings, 11, 12; Judge may proceed in summary way to try certain issues, 120.

**Cross References Forms:** Order restraining action before receiving order, 17; receiving order, 14; order transferring proceedings, 16.

**Analogous Legislation:** English Acts, 1914, ss. 7, 18(1), 53, 100(2); 1883, ss. 9, 20, 54, 97. Canadian Acts, 1875, ss. 16, 39, 90; 1869, ss. 10, 42, 66.

#### ANALYSIS OF NOTES.

Receiving order contrasted with authorized assignment.

Receiving order in England and Canada.

When receiving order is made.

Trustee constituted receiver.

Power of court over actions and process against debtor and his property—

Remedies against the property or person of the debtor.

Actions or other legal proceedings.

Statute of Limitations.

Principle on which the court will grant leave to sue.

Rights of secured creditors.

Property of debtor vests in trustee.

Trustee steps into the shoes of the debtor.

Vesting of property on change of trustee.

General.

Order made by the wrong court.

In three important respects a receiving order differs from an authorized assignment. There is no relation back of the title of the trustee in the case of an assignment. In the case of a receiving order, the property which vests in the trustee may be much more extensive than that vesting under an authorized assignment<sup>2</sup>. Finally an authorized assignment being an act of bankruptcy may be avoided by the subsequent making of a receiving order founded on it<sup>3</sup>.

A receiving order has different results under the English and Canadian Acts. Under the former it protects the estate until such time as a composition is

Receiving order contrasted with authorized assignment.

Receiving order in England and Canada.

<sup>2</sup> See notes to 6(3), 25, 4(10), 9 and 10.

<sup>3</sup> See notes to section 3. These differences are discussed in the notes to sections 9 and 10, and see notes to 4(6).



**Section 6** agreed upon or an adjudication is made. With us it divests the debtor of all his property<sup>4</sup>, and vests it in the trustee. In England it is the adjudication which does this.

When receiving order is made.

A receiving order is made when it is pronounced; not when it is drawn up and signed<sup>5</sup>.

Trustee constituted receiver.

The fact that the trustee is appointed receiver of the property of the debtor will in some respects amplify the powers conferred on him by sections 17 to 22 of the Act<sup>6</sup>. It also affects the rights of judgment creditors<sup>7</sup>.

Power of Court over actions and process against debtor and his property.

Section 6(1), which deprives any creditor, to whom the debtor is indebted in respect of any debt provable in bankruptcy, of his remedies against the property or person of the debtor and denies him the right to commence any action or other legal proceedings unless with leave of the court, must be compared with section 7. The effect of section 6(1) and section 7, when read together, is as follows:—

(1) At any time after the presentation of a bankruptcy petition the Court of Bankruptcy, or the court in which proceedings are pending, may order any action, execution or other proceeding against the person or property of the debtor to stand stayed<sup>8</sup>. The section is not limited to actions with respect to debts provable in bankruptcy<sup>9</sup>;

(2) On the making of the receiving order,

(a) No creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt<sup>10</sup>.

<sup>4</sup> See sections 6(3) and 25, and see notes to section 4(10).

<sup>5</sup> *In re Manning* (1885), 30 Ch. D. 480; 55 L. J. Ch. 613; *Blount v. Whitely* (1899), 79 L. T. 635; 6 Mans. 48; *per Chitty, L.J.*, in *In re Calcott & Elwin's Contract* (1898), 2 Ch. 460; 67 L. J. Ch. 553; 5 Mans. 208.

<sup>6</sup> As to the powers and duties of receivers appointed by the court and the effect of this appointment, see Kerr, *Law & Practice of Receivers*, Sweet and Maxwell; Halsbury: *Laws of England*, Vol. XXIV.; Riviere: *The Law Relating to Receivers and Managers*, Stevens & Sons.

<sup>7</sup> *Stuart v. Grough* (1888), 15 O. A. R. 299.

<sup>8</sup> Section 7(1).

<sup>9</sup> See notes to sections 7 and 63, and Rule 120.

<sup>10</sup> Section 6(1).



This will prevent the issuing of execution or other process. Section 6

- (b) No such creditor shall commence any action or other legal proceedings unless with the leave of the court<sup>1</sup>.
- (c) The power of a secured creditor to realize or otherwise deal with his security is not affected.

3. On the making of the receiving order every action, execution or other proceeding for the recovery of a debt provable in bankruptcy shall stand stayed<sup>2</sup>; but this is not to affect the rights of secured creditors to realize or otherwise deal with their securities.

Section 6(1) applies to remedies for enforcing payment of the debt such as commitment orders<sup>3</sup>, but it does not apply to remedies by committal or attachment as punishment for an offence<sup>4</sup>. Nor *semble*, does it interfere with the duty of a sheriff to sell under a writ of execution issued before the receiving order was made<sup>5</sup>; nor does it apply to process already executed<sup>6</sup>. As to whether the claim of creditors of an undischarged bankrupt to be paid out of a fund over which the bankrupt had a testamentary power of appointment is a "claim against the property or person of the debtor" *quære*<sup>7</sup>.

Remedies  
against the  
property or  
person of  
the debtor.

<sup>1</sup> Section 6(1).

<sup>2</sup> Section 7(2). Under *The Winding-Up Act*, 1906, c. 23, executions put in force after the making of the winding-up order are void: *Risler v. Alberta Newspapers, Ltd.* (1919), 46 D. L. R. 536.

<sup>3</sup> *In re Ryley ex parte O. R.* (1885), 15 Q. B. D. 329; 54 L. J. Q. B. 420; 2 Mor. 171; and see *Cobham v. Dalton* (1875), L. R. 10 Ch. 655; 44 L. J. Ch. 702.

<sup>4</sup> *In re Smith, Hands v. Andrews* (1893), 2 Ch. 1; 62 L. J. Ch. 336, and *In re and ex parte Edgecome* (1902), 2 K. B. 403; 71 L. J. K. B. 722; 9 Mans. 227; *In re Wray* (1887), 36 Ch. D. 138; 56 L. J. Ch. 737, 1106; *Cobham v. Dalton*, *supra*, is overruled on this point.

<sup>5</sup> *Per Fry and Lopes, L.JJ.: Woolford's Trustees v. Levy* (1892), 1 Q. B. 772, 781, 782; 61 L. J. Q. B. 546. No doubt section 7(2) would apply to such a case, and see section 11(1) (3) (10).

<sup>6</sup> *Earl of Leves v. Barnett* (1877) L. R. 6 Ch. 252; 47 L. J. Ch. 144. Where a defaulting trustee had been attached and imprisoned before the date of the receiving order. See where a defaulting trustee who had been served with notice of motion for a writ of attachment filed a petition and then applied to the Court of Bankruptcy to stay further proceedings in the action *In re and ex parte MacKintosh* (1884), 13 Q. B. D. 325; 1 Mor. 84.

<sup>7</sup> *In re Guedalla* (1905). 2 Ch. 331; 75 L. J. Ch. 52; 12 Mans. 392; *In re Benson, Bower v. Chetwynd* (1914), 2 Ch. 68; 83 L. J. Ch. 658; 21 Mans. 8.



## Section 6

Actions or  
other legal  
proceedings.

The clause of section 6(1) prohibiting the commencement of any actions or other legal proceedings has no reference to proceedings actually pending at the date of the receiving order<sup>8</sup>. A receiving order once pronounced is a bar to the commencement of an action against the debtor<sup>9</sup> though the order may not have been drawn up<sup>10</sup>. A creditor who has obtained a receiving order may not abandon it, for the order is for the benefit of the whole body of creditors<sup>1</sup>.

Statute of  
Limitations.

Once the Statute of Limitations begins to run it would seem that it continues to run in spite of the bankruptcy, and of the prohibition contained in this section<sup>2</sup>, but the Statute does not as regards claims which arise during and in the bankruptcy, commence to run before discharge<sup>3</sup>. A payment of dividends by the trustee in bankruptcy is not a payment from which a promise to pay the balance can be inferred<sup>4</sup>.

Principle on  
which the  
Court will  
grant leave  
to sue.

As to the principle on which the court will give leave to commence actions or other legal proceedings it has been said that there is no general rule that when the questions involved are questions of bankruptcy only, the Court of Bankruptcy is to try the case<sup>5</sup>. The question in each case must be decided on the facts of the case; and the discretion of the court is completely unlimited by any such general rule<sup>6</sup>.

Rights of  
secured  
creditors.

Although section 6(1) purports to preserve the power of a secured creditor to realize or otherwise deal with his security, the fact that the trustee has been made a receiver will prevent the holder of a bill of sale from ousting the receiver from possession<sup>7</sup>; and

<sup>8</sup> They are dealt with by section 7(1) (2); *In re Wray* (1887), 36 Ch. D. 143; 56 L. J. Ch. 1106; *In re Berry, Duffield v. Williams* (1896), 1 Ch. 939, 946; 65 L. J. Ch. 245; 3 Mans. 11.

<sup>9</sup> As to the staying of pending actions, see section 7(1).

<sup>10</sup> *Blount v. Whitely* (1899), 79 L. T. 635; 6 Mans. 48.

<sup>1</sup> S. C.

<sup>2</sup> *In re Benzon, Bower v. Chetwynd* (1914), 2 Ch. 68; 83 L. J. Ch. 658; 21 Mans. 8, and see as regards secured creditors: *Court v. Walsh* (1884), 9 O. A. R. 294.

<sup>3</sup> S. C.

<sup>4</sup> S. C.

<sup>5</sup> *Sharp v. McHenry* (1887), 55 L. T. 747. But see notes to section 63 and Rule 120.

<sup>6</sup> S. C., see further notes to section 7.

<sup>7</sup> *Ex parte Cochrane in re Mead* (1875), L. R. 20 Eq. 282; 44 L. J. Bank. 87; *In re Fells ex parte Andrews* (1876), 4 Ch. D. 509; 46 L. J.



it has been said that any person who claims a better title than the receiver ought to apply to the Court of Bankruptcy to enforce his rights<sup>8</sup>. The rights of a secured creditor may also be affected by the relation back of the trustee's title<sup>9</sup>; for a secured creditor who has notice of an available act of bankruptcy by his debtor cannot safely receive payment from his debtor and consequently the debtor cannot, at least after the presentation of a petition<sup>10</sup>, make a good tender to him and require him to give up his securities on payment of the amount due<sup>1</sup>.

## Section 6

The protection afforded to secured creditors does not apply to those who do not fall within the definition given in section 2(*gg*). Consequently, since the issuing of a writ of sequestration at the instance of a creditor does not make him a secured creditor<sup>2</sup>, the court may under section 7(1), by an interim injunction restrain further proceedings under the sequestration pending the hearing of the petition in bankruptcy<sup>3</sup>, and when the receiving order is made the action will stand stayed. But as under certain Provincial Acts with respect to liens, a creditor becomes a secured creditor by the performance of work, he will not be restrained from registering his claim for lien<sup>4</sup>. The rights of the trustee against secured creditors who are pledgees or pawnees are dealt with by section 22(2).

Section 6(3) provides that on the making of a receiving order the property of the debtor shall forth-

Property of  
debtor vests  
in trustee.

Bank. 23, and see as to the issuing of a sequestration by a mortgagee to compel the appearance of the mortgagor: *Ex parte Rogers in re Boustead* (1881), 16 Ch. D. 665.

<sup>8</sup> *Ex parte Cochrane in re Mead, supra*. See where an order under *The Winding-Up Act* was made *nunc pro tunc*: *Plummer v. Sullivan Machinery Co.* (1917), 24 B. C. R. 104; 2 W. W. R. 229.

<sup>9</sup> See section 4(10).

<sup>10</sup> Sections 6(3) and 25, and see notes to 4(10).

<sup>1</sup> *Ponsford, Baker & Co. v. Union of London Bank* (1906), 2 Ch. 444; 75 L. J. Ch. 724; 13 Mans. 321.

<sup>2</sup> *Ex parte Brown in re Hastings* (1892), 61 L. J. Q. B. 654; 9 Mor. 234.

<sup>3</sup> *Ex parte Brown in re Hastings, supra*.

<sup>4</sup> See *Clinton Thresher Co.* (1910), 1 O. W. N. 445; 15 O. W. R. 319; *In re The Empire Brewing & Malting Co.; Rourke & Cass' Claim* (1891), 8 Man. L. R. 424; and see as to Woodmen's Liens: *Good v. Nepisquit Lumber Co.* (1912), 41 N. B. R. 57, and maritime liens: *In re The Fort George Lumber Co.* (1913), 48 S. C. R. 593.



## Section 6

with pass to and vest in the trustee named therein<sup>5</sup>. The receiving order is made when the decision is pronounced, not when the order is signed<sup>6</sup>. The property of the debtor means the property of the debtor divisible amongst his creditors. It comprises all such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition, and all property which may be acquired by or devolve on him before his discharge<sup>7</sup>. As the receiving order vests<sup>8</sup> in the trustee all the property of the debtor, the debtor no longer can deal with the property, or give a valid receipt for the balance of the purchase money due under a contract of sale entered into before the receiving order. If the purchaser pays the moneys to the debtor it is his misfortune that he has paid the money to a person who has ceased to be the owner of the property<sup>9</sup>.

Trustee  
steps into  
shoes of  
debtor.

Generally speaking the trustee steps into the shoes of the bankrupt. That is to say that where the title of the trustee does not relate back to avoid the transaction, and where the transaction is not against the bankruptcy law, or where the trustee has no statutory right of attacking transactions of the bankrupt the trustee stands in no better position than the bankrupt<sup>10</sup>. The position of the trustee is fully treated in Chapter VI.

<sup>5</sup> It is suggested that the vesting is by force of the statute. See English Act, 1914, s. 53, and *In re Calcott & Elvin's contract* (1898), 2 Ch. 464; 67 L. J. Ch. 553; 5 Mans. 208; compare sections 10 and 15(3). It was said in *Callender v. Colonial Secretary of Lagos* (1891), A. C. 460, 466: "probably none of the Bankruptcy Acts would be held to pass land more completely than the bankrupt himself could pass it by conveyance". See where an assignee is appointed liquidator: *Kinsman v. Parker* (1919), 52 N. S. R. 553; 1 C. B. R. 161.

<sup>6</sup> *In re Manning* (1885), 30 Ch. D. 480; 55 L. J. Ch. 613; *Blount v. Whitely* (1899), 79 L. T. 635; 6 Mans. 48.

<sup>7</sup> Section 25: Compare the property which vests in the trustee on the making of an authorized assignment, section 10. Section 6(3) must be read with section 4(10) and section 32.

<sup>8</sup> As to the effect of this statutory vesting, see notes to 11(4). After-acquired property vests in the trustee in a qualified sense until he intervenes. See notes to sections 25 and 34.

<sup>9</sup> *Ex parte Rabbidge in re Pooley* (1878), 8 Ch. 367; 48 L. J. Bank. 15, and see *Jenks v. Doran* (1880), 5 O. A. R. 558, as to a promissory note put in circulation after the date of the receiving order; and see notes to section 4(10).

<sup>10</sup> *In re Wilson Estate* (1915), 33 O. L. R. 501.



In any case of change of trustee the property of the debtor passes from trustee to trustee and vests in the trustee for the time being during his continuance in office without any conveyance, assignment or transfer whatever<sup>1</sup>. Section 6  
Vesting of property on change of trustee.

The words "shall vest in the trustee for the time being, during his continuance in office without any conveyance, assignment or transfer whatever" appear to refer to the case where there is a change of trustee and not to the vesting in the first trustee<sup>2</sup>. Section 11(4) provides that no receiving order or authorized assignment or other document made or executed under authority of the Act shall be within the operation of any provincial legislative enactment relating to deeds, mortgages, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges upon property real or personal, moveable or immovable.

A bank can be compelled to pay over to the trustee without the production of the deposit receipt moneys deposited by the bankrupt prior to his bankruptcy<sup>3</sup>. As to the property of a partnership where one partner dies and the surviving partners agree to convey all the partnership assets to his executrix in consideration of a release from all liability for any balance due, and the partnership subsequently becomes insolvent, see *Davidson v. Papps*<sup>4</sup>. General.

Section 4(11) and 6(4) read together would seem to have the effect of validating an order of the wrong court made inadvertently<sup>5</sup>. So long as the petition is inadvertently and not wilfully presented in the wrong court, and the conditions of section 6(4) complied with, the registrar may hear the petition and make a receiving order, and may then invoke the Orders made by the wrong Court.

<sup>1</sup>Section 6(3): Section 15(1) provides for the substitution of one trustee for another by the creditors. Sections 15(2) and 14(10) provide for the removal, substitution or appointment of trustees by the court.

<sup>2</sup>*Ad proximum antecedens fiat relatio nisi impediatur sententia: The Molsons Bank v. Halter* (1890), 18 S. C. R. 88.

<sup>3</sup>*Bank of Montreal v. Little* (1870), 17 Gr. 313.

<sup>4</sup>1880, 28 Gr. 91.

<sup>5</sup>See *Ex parte and in re French* (1889), 24 Q. B. D. 63; 6 Mor. 258.



**Section 7** power contained in this section, and transfer the proceedings to the proper court<sup>6</sup>. If the registrar refuses to make the order, it may be made on appeal<sup>7</sup>.

### *Stay of Proceedings.*

Power to  
stay  
proceedings.

7 (1) The court may, at any time after the presentation of a bankruptcy petition against a debtor, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last mentioned court shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on proof that a bankruptcy petition has been presented against the debtor, stay such proceedings until the first mentioned court shall otherwise order.

Stay of  
proceedings.

(2) On the making of a receiving order every such action, execution or other proceeding for the recovery of a debt provable in bankruptcy shall, subject to the provisions of the next preceding section as to the rights of secured creditors, stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

**Cross References Act:** No remedy after the making of receiving order, 6(1); right of landlord to distrain to cease, 52(1); debts provable, 44; effect of discharge, 61; jurisdiction of court, 63; stay of proceedings in assignment and composition cases, 13a.

**Cross References Rules:** Presentation of petition, 76; proceedings under *The Winding-Up Act*, 13; judge may proceed in a summary way to try certain issues, 120.

<sup>6</sup> *Ex parte May in re Brightmore* (1884), 14 Q. B. D. 37; 1 Mor. 253; *In re and ex parte French*, *supra*; *Revell v. Blake* (1873), L. R. 8 C. P. 533; 42 L. J. C. P. 195; and see on the English Act of 1869, where proceedings in the wrong court were not a nullity: *In re Buckland* (1873), L. R. 15 Eq. 221.

<sup>7</sup> *Ex parte May in re Brightmore*, *supra*, and see *Ex parte Soames in re Walker* (1884), 13 Q. B. D. 484; 1 Mor. 193.



**Cross References Forms:** Order restraining action before receiving order, 17. **Section 7**

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**Analogous Legislation:** English Act, 1914, s. 9(1). Canadian Acts, 1875, ss. 36, 90; 1869, ss. 42, 66. *The Winding-Up Act*, 1906, ss. 22, 23, 84, 133.

#### ANALYSIS OF NOTES.

General intention to have all matters dealt with in Bankruptcy Court.

Cases in which actions may proceed outside Bankruptcy Court.

- (a) Actions by secured creditors.
- (b) Actions in respect of non-provable debts.
- (c) Actions outside the jurisdiction.
- (d) Miscellaneous cases.

This section does not apply to the case of an authorized assignment<sup>7</sup>. The petition is presented when it is filed<sup>8</sup>.

Section 7 must be read with sections 6(1) and 63.

Section 7(1) is in terms wide enough to include all actions, executions, or other legal proceedings whether in respect of a debt provable in bankruptcy or otherwise; but the power of restraint is not generally exercised in England when the question does not affect the estate generally, or where questions of bankruptcy law are not involved; or where proceedings in bankruptcy might limit the rights of some of the litigants by denying, for example, the right of appeal with respect to title to land<sup>9</sup>.

Section 7(2) refers only to actions, executions or other proceedings against the property or person of the debtor for the recovery of a debt provable in bankruptcy<sup>10</sup>. The principles on which the court acts under section 7(1) in issuing an injunction and those on which it acts under 7(2) in permitting an action to continue, are harmonious and similar to those under which the jurisdiction under 6(1) is exercised. Section 7(2) should be read with section 11(1) and 11(10).

<sup>7</sup> For the case of an authorized assignment, see sec. 13A.

<sup>8</sup> Rule 76.

<sup>9</sup> *Ex parte Reynolds in re Barnett* (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 2 Mor. 147; *Sharp v. McHenry* (1887), 55 L. T. 747. See for a fuller discussion on questions of jurisdiction and policy, notes to section 63, and see Rule 120.

<sup>10</sup> See as to debts provable in bankruptcy, section 44.



**Section 7**      The intention is that on the making of the receiving order no more litigation between the bankrupt and his creditors shall be permitted, except in special circumstances, as where a case is at the time of bankruptcy ripe for trial, in which case the amount of the proof against the bankrupt's estate would not be seriously affected<sup>1</sup>. There is no general rule in England that when the questions involved are questions of bankruptcy only, the Court of Bankruptcy is to try the case<sup>2</sup>. The granting of the injunction or permission to proceed is discretionary<sup>3</sup>.

**General intention to have all matters dealt with in Bankruptcy Court.**      Generally speaking there are four classes of actions or proceedings which the court in England will not restrain, but will permit to proceed; these are:—

- (a) Actions or proceedings by secured creditors.
- (b) Actions or proceedings in respect of matters not provable in bankruptcy.
- (c) Certain actions outside the jurisdiction.
- (d) Miscellaneous cases.

**(a)**  
Actions, etc.,  
by secured  
creditors.

Both sections 6(1) and 7(2) preserve the rights of secured creditors, and actions, executions or other proceedings by them to realize or otherwise deal with their security will not be restrained<sup>4</sup>. Thus the court in England will not restrain an equitable second mortgagee from proceeding in the Chancery Division against the trustee in bankruptcy of the mortgagor,

<sup>1</sup> *Brownscombe v. Fair* (1888), 58 L. T. 85. See as to the constitutionality of such legislation: *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575, and notes to section 63.

<sup>2</sup> *Sharp v. McHenry* (1887), 55 L. T. 747. See generally notes to section 63 and Rule 120.

<sup>3</sup> *Ex parte Mills in re Manning* (1871), L. R. 6 Ch. 594; 40 L. J. Bank. 89; *Ex parte Rogers in re Boustead* (1881), 16 Ch. D. 665.

<sup>4</sup> See as to the other policy under section 50 of the Act of 1869: *Archibald v. Haldan* (1870), 30 U. C. Q. B. 30; *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575, and cases cited in *Henderson v. Kerr* (1875), 22 Gr. 91, and the wider rule under *The Winding-Up Act: Re Kurtz v. McLean, Ltd.* (1908), 11 O. W. R. 437; *National Trust Co. v. Trusts & Guarantee Co., Re Raven Lake Portland Cement Co.* (1911), 24 O. L. R. 246. Compare *In re David Lloyd & Co.* (1877), 6 Ch. D. 339; *Capital Trust Corporation, Ltd. v. The Yellowhead Pass Coal & Coke Co., Ltd.* (1916), 9 A. L. R. 463; 33 W. L. R. 873; 27 D. L. R. 25; *In re The Essex Land & Timber Co., Trout's Case* (1891), 21 O. R. 367; *In re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150; as to the displacement of a receiver appointed by debenture holders see *In re Joshua Stubbs, Ltd.* (1891), 1 Ch. 475.



## Section 7

and the first mortgagee, claiming an equitable charge on the property, redemption, and, if necessary, foreclosure<sup>5</sup>. But where it is desired to issue a sequestration to compel appearance of the defendant in a suit by a mortgagee to enforce his security *semble*, leave of the Court of Bankruptcy should first be obtained<sup>6</sup>; and while it may be that the court has power to prevent a sale of any part of a bankrupt's property while an administration is pending, if it is of the opinion that such a sale would interfere with the due administration of the estate by the trustee, still for the court to interfere the sale must probably be a sale of the same property, and of the same interest in that property as that with which the trustee has to deal<sup>7</sup>.

The court in England will not restrain actions, executions or other proceedings in respect of non-provable debts<sup>8</sup>. Thus as alimony payable under an order of the Divorce Court is not a debt provable in bankruptcy, steps can be taken to enforce payment of alimony due after bankruptcy, notwithstanding the receiving order<sup>9</sup>, but an annuity payable under a separation deed is provable in bankruptcy, and an action cannot be maintained to enforce it<sup>10</sup>. Arrears of alimony which became arrears before bankruptcy stand on a different footing from future payments of alimony<sup>1</sup>.

The court will not interfere with actions outside the jurisdiction<sup>2</sup>, when foreign creditors resident

(b)  
Actions in  
respect of  
non-provable  
debts.

(c)  
Actions  
outside the  
jurisdiction.

<sup>5</sup> *Ex parte Hirst in re Wherly* (1879), 11 Ch. D. 278; *White v. Simmons* (1871), L. R. 6 Ch. 555; 40 L. J. Ch. 689.

<sup>6</sup> *Ex parte Rogers in re Boustead* (1881), 16 Ch. D. 665.

<sup>7</sup> *Re Evelyn ex parte General Public Works* (1894), 2 Q. B. 302.

<sup>8</sup> See under *The Insolvent Act of 1869*: *Burke v. McWhirter* (1874), 35 U. C. Q. B. 1; *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575; *Archibald v. Haldan*, *supra*, see generally: *Ex parte Baum in re Edwards* (1874), L. R. 9 Ch. 673; 44 L. J. Bank. 25.

<sup>9</sup> *Linton v. Linton* (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; 2 Mor. 179.

<sup>10</sup> *Victor v. Victor* (1912), 1 K. B. 247; 81 L. J. K. B. 354; 19 Mans. 53.

<sup>1</sup> *Linton v. Linton* (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; 2 Mor. 179; *In re Stillwell, Brodrick v. Stillwell* (1916), 1 Ch. 365.

<sup>2</sup> As to whether outside the jurisdiction means outside the Dominion, see section 63 and *Stewart v. Lepage* (1916), 53 S. C. R. 337; *In re Tobique Gypsum Co.* (1903), 6 O. L. R. 515; *Baxter v. Central Bank* (1891), 20 O. R. 214.



Section 7. abroad are suing abroad, and the injunction will be wholly ineffectual<sup>3</sup>. Nor will an incumbrancer on immoveable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, be restrained from prosecuting such proceedings if the party seeking to restrain him may appear before the foreign tribunal and assert his rights<sup>4</sup>. But the court may in certain cases restrain proceedings outside the jurisdiction; as where the person suing had already come in under an inspectorship deed<sup>5</sup>, or where he is resident within the jurisdiction<sup>6</sup>. Generally speaking the court will not interfere by injunction unless it is clear that there will thereby be no interference with the rights of the plaintiff<sup>7</sup>; or that thereby expenses will be saved<sup>8</sup>, or that the injunction is needed to protect the property of the bankrupt<sup>9</sup>.

(d)  
Miscellaneous  
cases.

In certain other cases the court in England will exercise its discretion to allow actions or other proceedings to be continued. Though the court will not generally permit proceedings to continue in any other court with respect to debts which are provable in the bankruptcy, an exception exists in the case of debts provable in bankruptcy to which the discharge of the bankrupt will be no defence<sup>10</sup>. Such actions may be allowed to proceed to judgment; but although proof may be made in bankruptcy for the amount of the judgment the judgment cannot be enforced<sup>1</sup>. The court will restrain a sale by sequestrators to enforce compliance with an

<sup>3</sup> *In re Chapman* (1872), L. R. 15 Eq. 75; 42 L. J. Bank. 38.

<sup>4</sup> *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

<sup>5</sup> *In re and ex parte Tait* (1872), L. R. 13 Eq. 311; 41 L. J. Bank. 32.

<sup>6</sup> *Ex parte Ormiston in re Distin* (1871), 24 L. T. (N.S.) 197, and see as to sequestration: *Ex parte Rogers in re Boustead* (1880), 16 Ch. D. 665.

<sup>7</sup> See where representations had been made which had induced the plaintiff to delay proceedings for some time: *In re Lake Superior Native Copper Co., Ltd.* (1885), 9 O. R. 277.

<sup>8</sup> *In re Spalding ex parte O. R.* (1889), 6 Mor. 163.

<sup>9</sup> *In re Chapman*, *supra*.

<sup>10</sup> Section 61.

<sup>1</sup> *Ross v. Gutteridge* (1883), 52 L. J. Ch. 280; 48 L. T. (N.S.) 117; *Ex parte Coker in re Blake* (1875), L. R. 10 Ch. 652; 44 L. J. Bank. 126.



order for the payment of money, for a creditor who has obtained an order of sequestration does not become a secured creditor by reason merely of having obtained the writ<sup>2</sup>. Where a creditor commenced an action after the making of the receiving order in a matter involving a very large amount, and having reference to the title of real estate, Kay, J., refused to stay proceedings in the Chancery Division<sup>3</sup>. In a case under *The Winding-Up Act*, the court allowed a servant of the company to sue the company for arrears of wages so that he might on the execution being returned unsatisfied sue the directors<sup>4</sup>. When at the time of the presentation of the petition the grantee of a bill of sale is in actual possession of the property comprised in the deed the court will not interfere by injunction with the exercise of his legal rights on the mere suggestion that there may be a possibility of impeaching the deed<sup>5</sup>. The Bankruptcy Court, it has been said, cannot go into the question of the amount of maintenance in an administration action. Such an action will be continued in the proper court<sup>6</sup>. Where action is brought against two partners on a bill of exchange against one of whom a receiving order has been made, the Court may either restrain the plaintiff from proceeding against the insolvent acceptor; or may allow the action to proceed and restrain the plaintiff from enforcing his judgment against the property or person of the insolvent acceptor<sup>7</sup>. As to order of committal on judgment summons, see *In re Nuthall, Ford v. Nuthall*<sup>8</sup>.

<sup>2</sup> *In re Hastings ex parte Brown* (1892), 61 L. J. Q. B. 654; 9 Mor. 234; *Ex parte Hughes in re Brown* (1871), L. R. 12 Eq. 137.

<sup>3</sup> *Sharp v. McHenry* (1886), 55 L. T. 747.

<sup>4</sup> *In re Lake Winnipeg Transportation, Lumber & Trading Co., Ltd.* (1891), 7 M. L. R. 602.

<sup>5</sup> *Ex parte Bayly in re Hart* (1880), 15 Ch. D. 223.

<sup>6</sup> *Lykes, Jaram v. Holmes* (1909), 53 Sol. J. 267.

<sup>7</sup> *Ex parte Mills in re Manning* (1871), L. R. 6 Ch. 594; 40 L. J. Bank. 89; but see *Ex parte Isaac in re De Vecchi* (1870), L. R. 6 Ch. 58; 40 L. J. Bank. 19.

<sup>8</sup> (1891), 8 Mor. 106.

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8 (1) The provisions of this Part of this Act shall not apply to wage-earners or to per-  
Application  
of Part I.



### Section 8

Certain acts  
of debtor  
not deemed  
an available  
act of  
bankruptcy.

sons engaged solely in farming or the tillage of the soil.

(2) Notwithstanding anything in this Part appearing, no act or omission of a debtor in respect of any debt which,—

(a) was contracted or existed before the coming into operation of this Act; or

(b) is or is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof (whether or not such judgment or instrument is a renewal or one of several renewals, had or made, before or after the coming into force of this Act, proceeding from the same cause or consideration) existed before the coming into operation of this Act; shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition, but it shall be provable in any proceedings otherwise founded under this Part, and otherwise.

**Cross References Act:** Wage earners are defined, 2(*kk*); acts of bankruptcy defined, 3; proof of debts, 45; coming into operation of the Act, 98; Part I. is sections 3 to 8 inclusive.

Section 8(1) The part of the Act referred to is Part I., Bankruptcy and Receiving Orders, sections 3 to 8 inclusive.

Section 8(2) The Act was brought into force on July 1st, 1920. See notes to section 98.

If section 8(2) was intended to prevent any creditor from founding a bankruptcy petition on an act of bankruptcy occurring prior to the coming into operation of the Act; or to use as a petitioning creditor's debt, any debt which was contracted or existed before the coming into operation of the Act, the language is perhaps not as happy as it might have been.

It is difficult to point out any act or omission with respect to a debt which the Statute makes an act of bankruptcy. The section closest in point seems to be 3(*e*); but it can be argued that the acts there referred



to are acts or omissions with respect to executions and not acts or omissions with respect to debts. Section 8

The fact that at most only one act of bankruptcy is declared not to be an available act of bankruptcy if it occurred prior to the coming into operation of the Act, may perhaps be urged as an argument that the Act is retrospective with respect to other acts of bankruptcy. Were it not for this argument little could be said against the view that acts of bankruptcy occurring before the coming into operation of the Act, are not available acts of bankruptcy<sup>9</sup>.

If the words "nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition" refer to the debt of five hundred dollars mentioned in section 4(3)(a), it will prevent a creditor who has only one claim against the debtor, and that incurred before 1st of July, 1920, from himself petitioning; though it may be held that the wording of section 8(2) does not prevent the debt referred to being used by another creditor to make the required aggregate of five hundred dollars; for it would seem that the question of retrospectivity or otherwise has no application to a debt presently payable.

It has been held that on an unopposed motion, in the absence of evidence as to when a debt was contracted or existed, a receiving order may be made<sup>10</sup>.

<sup>9</sup> See *In re and ex parte Pratt* (1884). 12 Q. B. D. 334; and notes to section 98.

<sup>10</sup> *Per* Holmested, R., in *Fisher v. Wilkie, Ltd.* (1920), 19 O. W. N. 251.



## PART II.

## ASSIGNMENTS AND COMPOSITIONS.

*Assignments.*

Sections  
9, 10, 10A

Assignment  
for general  
benefit of  
creditors.

9. Any insolvent debtor whose liabilities to creditors, provable as debts under this Act, exceed five hundred dollars, may, at any time prior to the making of a receiving order against him, make to an authorized trustee appointed pursuant to section fourteen with authority in the locality of the debtor, an assignment of all his property for the general benefit of his creditors. An assignment so made is in this Act referred to as an "authorized assignment," and every assignment of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors shall be null and void.

Form of  
assignment.

10. Every authorized assignment shall be valid and sufficient if it is in the form provided by General Rules or in words to the like effect; and an assignment so expressed shall, subject to the rights of secured creditors, vest in the trustee all the property of the assignor at the time of the assignment excepting such thereof as is held by the assignor in trust for any other person and such thereof as is, against the assignor, exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

Filing of  
assignment  
in court by  
authorized  
trustee.

- 10A. (1) Every authorized trustee to whom an assignment is made under section nine of this Act shall within four days of such



assignment file, in the court having jurisdiction in the locality of the debtor, the said assignment, and should another authorized trustee be subsequently appointed in his stead such other trustee shall within four days of his appointment give notice thereof to the said court.

Sections  
9, 10, 10A

- (2) This section, substituting 'forthwith' for 'within four days of such assignment' and for 'within four days of his appointment', shall apply to all authorized assignments made and to all authorized trustees substituted since the coming into force of this Act.

Retroactive  
effect.

**Cross References Act:** Insolvent defined, 2(*t*); debtor defined, 2(*o*); making of R. O., 4(6); A. A. defined, 2(*f*); is an act of bankruptcy, 3(*a*); administration under A. A. or under R. O., 4(6); form and effect of, 10; takes precedence in certain cases, 11(1)(10), *Cf.* 11(3); to be registered, 11(8)(14)(15); notice of to be gazetted and published, 11(4); mistakes in may be cured, 12; may be annulled, 13(18); locality of debtor defined, 2(*x*); persons authorized to act for corporations, partnerships and firms. 85; debts provable, 44; property defined, 2(*dd*); property not divisible among creditors, 25; stay of proceedings in case of authorized assignment, 13*a*.

**Cross References Forms:** Assignment for the General Benefit of Creditors, 18, 19.

**Analogous Legislation:** Canadian Act, 1875, ss. 14, 15, 16. *Cf.* English Act, 1914, ss. 3, 6, 7. *Cf. Provincial Assignments and Preferences Acts:* R. S. N. S. 1900, c. 145, ss. 10, 5; 1900, c. 34, s. 1. R. S. N. B. 1903, c. 141, ss. 3, 4. P. E. I. 1898, c. 4, ss. 4, 5. R. S. O. 1914, c. 134, ss. 8, 9. R. S. M. 1913, c. 12, ss. 5, 6, 7. R. S. B. C. 1911, c. 13, ss. 3, 4, 5, 43, and see 69. Alberta 1907, c. 6, ss. 5, 6, 7. R. S. S. 1909, c. 142, ss. 6, 7, 8. N. W. T., see Alberta 1907, c. 6, ss. 5, 6, 7.

#### ANALYSIS OF NOTES.

Authorized assignment compared with receiving order.

First: Property passing under authorized assignment.

Exception from property vesting under authorized assignment.

In what way the property vests in the trustee.

Trustee steps into the shoes of the assignor.

Second: No relation back of title of trustee.

Third: An authorized assignment an act of bankruptcy.

Whether a trustee under an authorized assignment may be a trustee *de son tort*.

Position of creditors under assignment avoided by bankruptcy.

Rights of secured creditors.

Who may make an assignment.

When assignment may be made.



**Sections  
9, 10, 10A**

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Assignment to trustee outside locality of debtor.  
 Avoidance of assignment other than authorized assignment.  
 As to avoiding assignments under Provincial Acts.  
 Form of authorized assignment.  
 Effect of assignment on insurance policy.  
 Assignment not a "Sale".  
 Assignment for fraudulent purpose.

Authorized  
 assignment  
 compared  
 with  
 receiving  
 order.

In three important respects an authorized assignment differs from a receiving order. In the first place the property of the debtor vesting in the trustee is much less extensive under an authorized assignment than it is under a receiving order. Secondly, there is no relation back of the title of the trustee under an authorized assignment<sup>1</sup>. Thirdly, as an authorized assignment is an act of bankruptcy, the title of the trustee under an authorized assignment may, it is conceived, be overreached by the title of the trustee under a subsequent receiving order; and this raises the further question whether the trustee under the authorized assignment will be a trustee *de son tort* for the period covered by the relation back of the title of the new trustee, as may be the trustee in England who acts under a deed of arrangement registered in pursuance of *The Deeds Arrangement Act*<sup>2</sup>.

First;  
 property  
 passing  
 under  
 authorized  
 assignment.

The property<sup>3</sup> of the assignor, which vests in the trustee by reason of the assignment, is in two ways different from that which vests under a receiving order. As there is no relation back of the title of the trustee under an authorized assignment<sup>4</sup>, the trustee will not be entitled to property which would be covered by the relation back of the title of the trustee under a receiving order. It is only "the property of the assignor at the time of the assignment" which vests<sup>5</sup>. Secondly, under a receiving order, but not under an authorized assignment, the trustee is entitled to all property which may be acquired by or devolve on the bankrupt before his discharge<sup>6</sup>. An assignment by members of a partnership will pass not only part-

<sup>1</sup> See notes to section 4(10).

<sup>2</sup> (1914), 4 & 5 Geo. V. c. 47.

<sup>3</sup> As to what property includes, see notes to sections 2(*dd*) and 25.

<sup>4</sup> Compare 6(3), 25, 9, 10. and see notes to section 4(10).

<sup>5</sup> Section 10, see Form 18, which contains wider words.

<sup>6</sup> Section 25.



nership property but also separate property<sup>7</sup>, but an assignment by one partner only in his own name will pass no more than his individual property and his interest in the partnership property<sup>8</sup>; it will not make the other partners insolvent or transfer their property or interest to the assignee<sup>9</sup>, for one partner cannot assign the partnership assets<sup>10</sup>.

Sections  
9, 10, 10A

From the property so described as vesting in the trustee under an authorized assignment there are two exceptions. These are property held by the assignor in trust for some other person, and the assignor's non-exigible property<sup>1</sup>. These exceptions are fully discussed in section 25. The Ontario courts have interpreted the corresponding section of *The Ontario Assignments Act* as vesting in the trustee all the property of the debtor, except the property expressed to be excepted<sup>2</sup>. In Manitoba on the other hand on the provisions of the Manitoba Act, the interpretation has been that only such property vests in the trustee as is liable to seizure, attachment or other process of law at the suit of a creditor<sup>3</sup>.

Exception  
from  
property  
vesting under  
authorized  
assignment.

Whether the vesting is by force of the statute or by virtue of the assignment *quære*<sup>4</sup>. Under the Act of 1864, the assignment when made, even to an official assignee, was not valid unless accepted by or acted upon by the assignee<sup>5</sup>. But under the Act of 1874, it was held that the consent of the official assignee or execution by him of the assignment was not necessary

In what way  
the property  
vests in the  
trustee.

<sup>7</sup> *In re Macfarlane* (1868), 12 L. C. J. 239, and see *In re McLaren & Chalmers* (1876), 1 O. A. R. 68.

<sup>8</sup> *In re McKenzie* (1871), 31 U. C. Q. B. 1, 6.

<sup>9</sup> S. C.

<sup>10</sup> *Stevenson v. Brown* (1863), 9 U. C. L. J. N. S. 110.

<sup>1</sup> Section 10. Compare section 25.

<sup>2</sup> *In re Unitt and Prott* (1893), 23 O. R. 78; *Reinhardt v. Hunter* (1905), 6 O. W. R. 421.

<sup>3</sup> *McGregor v. Campbell* (1909), 19 Man. L. R. 38; 11 W. L. R. 153; Howell, C.J., Diss. See as to where a watch is wearing apparel: *In re Sanborn* (1878), 14 C. L. J. 241; *In re Robinson* (1879), 15 C. L. J. 287.

<sup>4</sup> Consider *In re Calcott & Elvin's Contract* (1898), 2 Ch. 460; 67 L. J. Ch. 553; 5 Mans. 208; *Parlee v. Agricultural Insurance Co.* (1876), 3 Pugsley 476; *In re Sullivan* (1869), 5 U. C. L. J. N. S. 71.

<sup>5</sup> *Yarrington v. Lyon* (1866), 12 Gr. 308; *Becher v. Blackburn* (1873), 23 U. C. C. P. 207. Both cases were decided on demurrer.



**Sections  
9, 10, 10A**

to give it operation as from the time of its execution at least when he afterwards accepted it<sup>6</sup>. Under the present Act no authorized trustee is bound to accept an authorized assignment or to act as trustee in matters relating to assignments if in his opinion the realizable value of the property of the debtor is not sufficient to provide the necessary disbursements and a reasonable remuneration for him, unless he has been paid or tendered a sum sufficient to defray such disbursements and remuneration<sup>7</sup>. The affidavit of execution for an assignment given in the Forms seems to contemplate the execution of the deed by two parties<sup>8</sup>.

Trustee steps into the shoes of the assignor.

The trustee under an assignment steps into the shoes of the debtor and occupies no higher position than he, except as to transactions against the bankruptcy laws and voidable in favour of creditors<sup>9</sup>.

Second :  
no relation  
back of title  
of trustee.

Secondly, there is no relation back of the title of the trustee under an authorized assignment. The relation back of the title of the trustee in the case of a receiving order is the result of sections 6(3) and 25. The matter is fully discussed in the notes to section 4(10).

Third :  
an authorized  
assignment an act  
of  
bankruptcy.

Thirdly, an authorized assignment is an act of bankruptcy, and even if it is not avoided by the making of a receiving order founded on it, the title of the trustee under the receiving order will relate back to the date of the presentation of the petition<sup>10</sup>.

Whether a  
trustee  
under an  
authorized  
assignment  
may be a  
trustee  
*de son tort*.

It would seem probable that an authorized trustee under an authorized assignment which is an act of bankruptcy will be liable to be considered a trustee *de son tort* if, at least, he has accepted the assignment after the presentation of the petition<sup>11</sup>. If the trustee is a trustee *de son tort* he is such as from the com-

<sup>6</sup> *Brown v. Wright* (1874), 35 U. C. Q. B. 378, and see *Haight v. Munro* (1860), 9 U. C. C. P. 462.

<sup>7</sup> Section 15(5). All other sub-sections of section 15 refer to new trustees.

<sup>8</sup> Form (19), and see notes to section 9.

<sup>9</sup> Sections 17 and 6(3) and chapter .

<sup>10</sup> See notes to sections 3(a), 4(10), 25, Rule 76.

<sup>11</sup> The point was not argued in *In re Croteau and Clark Co., Ltd.* (1920), 48 O. L. R. 359; 19 O. W. N. 199. See section 3(a) *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344, and see notes to section 4(10) and 17(1). See as to whether the trustee is bound to accept the assignment 15(3).



mencement of the title of the new trustee<sup>8</sup>, and cannot make any claim for personal services<sup>9</sup>, or for disbursements in connection with the deed of assignment, which is the act of bankruptcy<sup>1</sup>, and may be ordered to account for any loss or damage occasioned by his act<sup>2</sup>.

Sections  
9, 10, 10A

Whether a release of debts contained in a deed of assignment which is subsequently avoided by the bankruptcy of a debtor, will prevent the creditors who have assented to the deed from proving for their debts in the bankruptcy, is a matter of intention in each case<sup>3</sup>. When a deed of assignment is a nullity an assignor, who is an assenting party to the deed, is not estopped from presenting a bankruptcy petition<sup>4</sup>.

Position of  
creditors  
under  
assignment  
avoided by  
bankruptcy.

Section 10 provides that an authorized assignment shall, subject to the rights of secured creditors, vest in the trustee all the property of the debtor, with certain exceptions. The phrase "subject to the rights of secured creditors" is not conspicuously definite or precise. It may be compared with the words used in section 6(1), which deals with the effect of a receiving order, and says: "But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed". No doubt as cases arise it will be found that the rights of secured creditors referred to in section 10 are similar to those preserved in section 7(1)<sup>5</sup>.

Rights of  
secured  
creditors.

<sup>8</sup> *In re Hobbins ex parte O. R.* (1899), 6 Mans. 212, and see in *In re Carter and Kenderdine's Contract* (1897), 1 Ch. 776; 66 L. J. Ch. 408; 4 Mans. 34. The title of the trustee relates back to the presentation of the petition, sections 6, 25, Rule 76.

<sup>9</sup> *In re Richards ex parte O. R.* (1884), 32 W. R. 1001; 1 Mor. 242.

<sup>1</sup> *In re Foster ex parte Rawlings* (1887), 58 L. T. 114; 36 W. R. 144; 4 Mor. 292, and see notes to section 4(10). As to possible repayments by creditors, see *Ex parte Burman in re Jubb* (1897), 1 Q. B. 641; 66 L. J. Q. B. 452; 4 Mans. 30; *Ex parte Gundry in re Sharp* (1900), 83 L. T. 416.

<sup>2</sup> *In re McLaren & Chalmers* (1876), 1 O. A. R. 68.

<sup>3</sup> *In re Stephenson ex parte O. R.* (1888), 20 Q. B. D. 540; 57 L. J. Q. B. 451, 5 Mor. 44. As to whether an authorized assignment is "avoided" by the making of a receiving order *quære*. See notes to section 3.

<sup>4</sup> *In re Bagley* (1911), 1 K. B. 317; 80 L. J. K. B. 168; 18 Mans. 1, and see as to a deed which might be declared void on notice: *In re Clement ex parte Goas* (1886), 3 Mor. 153.

<sup>5</sup> Contrast the policy of *The Insolvent Act*, 1869, section 50, on which see *Archibald v. Haldan* (1870), 30 U. C. Q. B. 30.



Sections 9, 10, 10A  Who may make an assignment.	An insolvent debtor who has provable debts in excess of five hundred dollars may make an authorized assignment. Insolvent is defined in section 2( <i>t</i> ). Debtor includes person <sup>6</sup> . Person is defined in section 2( <i>aa</i> ). A corporation may make an assignment by act of the directors without consulting with the shareholders <sup>8</sup> . But one partner of a firm cannot, without authority, make an assignment by deed of the property and effects of the firm to a trustee for the benefit of creditors <sup>9</sup> , but if the assignment be executed by one partner in the partnership name, at the request of his co-partner, the assignment is effectual, even though the authority to execute the deed was not by deed, at least where the assignee has taken possession under the deed <sup>1</sup> .
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When assignment may be made.	The statute appears to leave the way open for a debtor to make an authorized assignment at any time before a receiving order is made, and this in spite of the fact that a petition in bankruptcy may have been presented. But the court will discourage the making of authorized assignments after the petition has been presented <sup>2</sup> . A receiving order is made when pronounced, not when signed <sup>3</sup> .
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Assignment to trustee outside locality of debtor.	<i>Semble</i> , following the reasoning of cases on previous Canadian Acts, an assignment to a trustee with authority in a locality other than that of the debtor will not pass the property of the debtor to that trustee <sup>4</sup> , but it is possible that a creditor who assents may be
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<sup>6</sup> 2(*o*).

<sup>8</sup> *Whiting v. Hovey* (1887) 14 S. C. R. 515, see section 85.

<sup>9</sup> *Stevenson v. Brown* (1863), 9 U. C. L. J. N. S. 110; *Cameron v. Stevenson* (1862), 12 U. C. C. P. 389; see section 85 and Lindley, Partnership, 8th edition, 1912, p. 729.

<sup>1</sup> *Nelles v. Malby* (1885), 5 O. R. 263; *Nolan v. Donnelly* (1884), 4 O. R. 440.

<sup>2</sup> *Re Crateau and Clark Co., Ltd.* (1920), 48 O. L. R. 359; 19 O. W. N. 199. See as to whether a trustee under an authorized assignment may be a trustee *de son tort*, *supra*, and notes to section 3(*a*).

<sup>3</sup> *In re Manning* (1885), 30 Ch. D. 480; 55 L. J. Ch. 613; *Blount v. Whitely* (1899), 79 L. T. 635; 6 Mans. 48.

<sup>4</sup> *Hingston v. Campbell* (1866), 2 U. C. L. J. N. S. 299; *White v. Cuthbertson* (1867), 17 U. C. C. P. 377; *McWhirter v. Learmouth* (1868), 18 U. C. C. P. 136; *contra*, *Brown v. Douglas* (1868), 13 L. C. J. 29; and see *Gravel v. Stewart* (1873), 17 L. C. J. 326, and *Newton v. Ontario Bank* (1867), 13 Gr. 652.



precluded from disputing the validity of the assignment<sup>5</sup>. The locality of the debtor is defined in section 2(x).

Sections  
9, 10, 10A

Were it not for the words in this section avoiding assignments other than authorized assignments they would be valid and effectual at common law unless avoided as acts of bankruptcy within six months after execution and delivery<sup>6</sup>. Normally a deed of assignment to a trustee for the benefit of creditors is a revocable mandate unless some other party has an interest in it<sup>7</sup>, or unless its terms are communicated to a creditor who expressly or impliedly assents to it<sup>8</sup>, when a binding irrevocable trust is created<sup>9</sup>. The execution of such a deed even before the deed becomes irrevocable is probably an act of bankruptcy<sup>1</sup>, particularly if it was thereby intended to defeat or delay creditors<sup>2</sup>. Section 15(5) provides that no authorized trustee is bound to accept an authorized assignment or to act as trustee in matters relating to assignments or receiving orders or to compositions, if in his opinion the realiz-

Avoidance  
of assign-  
ment other  
than  
authorized  
assignment.

<sup>5</sup> *McWhirter v. Learmouth*, *supra*, and see *Allan v. Garratt & Williamson* (1870), 30 U. C. Q. B. 165.

<sup>6</sup> *Johnson v. Osenton* (1869), L. R. 4 Ex. 107, 114, 115; *Wilson v. Cramp* (1865), 11 Gr. 444, and see section 3(a) and 4(3)(b); *In re Halstead ex parte Richardson* (1917), 1 K. B. 695; 86 L. J. K. B. 621; (1917), H. B. R. 60.

<sup>7</sup> *Ex parte Wreyford in re Ashby* (1892), 1 Q. B. 872; 9 Mor. 77; *Rea v. Humphris* (1904), 2 K. B. 89; 73 L. J. K. B. 464; 11 Mans. 139.

<sup>8</sup> *Per Strong, J. (dis.) in McAllister v. Forsyth*, 12 S. C. R. 1, 20; *Spooner v. Jones* (1871), 3 Ch. Ch. 481.

<sup>9</sup> *Ex parte O. R. in re Hobbins* (1899) 6 Mans. 212; *Johnson v. Osenton* (1870), L. R. 4 Ex. 107. See also notes to section 11(1)

<sup>1</sup> *Botcherby v. Lancaster* (1834), 1 A. & E. 77.

<sup>2</sup> *Brittain v. Brown* (1871), 24 L. T. 504; as to a deed delivered in escrow see *Bowker v. Burdekin* (1843), 11 M. & W. 128; 12 L. J. Ex. 329; *Pulling v. Tucker* (1821), 4 B. & Ald. 382; *Botcherby v. Lancaster*, *supra*; *Johnson v. Osenton* (1869), L. R. 4 Ex. 107; and see further on whether such deeds are acts of bankruptcy, notes to section 3(a). The question comes up whether the execution of an assignment which is null and void can be tendered in evidence to prove the act of bankruptcy alleged. A deed of assignment may be given in evidence in England as proof of an act of bankruptcy, though it is not stamped, and so would not be receivable in evidence in an action to enforce the deed: *Ponsford v. Walton* (1868), L. R. 3 C. P. 167; 37 L. J. C. P. 113; *Ex parte and in re Wensley* (1862), 1 DeG. J. & S. 273; 32 L. J. Bank 23; *Ex parte Squire in re Gouldwell* (1868), L. R. 4 Ch. 47; 38 L. J. Bank 13; *Ex parte Heapy in re Hollingshead* (1889), 58 L. J. Q. B. 297; 6 Mor. 66, and see further notes to section 3(a).



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9, 10, 10A

able value of the property of the debtor is not sufficient to provide for the necessary disbursements and a reasonable remuneration for the trustee, unless and until the trustee has been paid or tendered a sum sufficient to defray such disbursements and remuneration<sup>3</sup>. In order that an assignment may be an act of bankruptcy under section 3(a) it must be "an assignment of his property to a trustee or trustees for the benefit of the debtor's creditors generally"<sup>4</sup>. An assignment of part only of the debtor's property is not within section 3(a) nor is an assignment of all his property for the benefit of certain creditors only<sup>5</sup>. The words "and every assignment of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors shall be null and void" are open to similar interpretation, so that it may be that assignments of part only of an insolvent debtor's property are not avoided by this section<sup>7</sup>.

As to  
avoiding  
assignments  
under  
Provincial  
Acts.

It was pointed out by the Judicial Committee in the case of *Attorney-General (Ontario) v. Attorney-General (Canada)*<sup>8</sup>, that an assignment for the general benefit of creditors has its force and effect at common law quite independently of any system of bankruptcy or insolvency or any legislation relating thereto. Whether the provisions of section 9 avoiding assignments other than authorized assignments made by insolvent debtors is ultimately upheld as within the legislative competence of the Dominion would appear to depend on first whether the test of what is ancillary or necessarily incidental legislation within the competence of the Dominion legislature is that which is "reasonably necessary" or that which is "absolutely necessary"<sup>9</sup>, and secondly whether this provision is

<sup>3</sup> And see notes to section 10.

<sup>4</sup> Section 3(a).

<sup>5</sup> See notes to section 3(a). Though such an assignment may be within Provincial Acts in R. S. O. 1914, c. 134, s. 9.

<sup>7</sup> See as to other assignments under Provincial Acts, R. S. O. 1914, c. 134, s. 9; R. S. M. 1913, c. 12, s. 9.

<sup>8</sup> (1894), A. C. 189; 63, L. J. P. C. 59.

<sup>9</sup> See *per Anglin (dis.) Montreal St. Railway v. Montreal* (1910), 43 S. C. R. 197, 241, 246. Their Lordships in the Privy Council contented themselves with saying in that case "it must be shown that it is



held to be ancillary legislation within the definition used. It is, however, clear that so far as proceedings under *The Bankruptcy Act* are concerned, proceedings under an unauthorized assignment have no validity, and cannot be validated<sup>10</sup>; and it has been held that a trustee under an assignment declared void by this section has no status to impeach a chattel mortgage as fraudulent or void<sup>11</sup>.

Sections  
9, 10, 10A

The procedure to have a deed declared void under this section is by summary application under Rule 120.

An authorized assignment will be valid and effect-ual if in the words of Form 18 "or in words to the like effect". No general rule can be laid down as to what are "words to the like effect". It has been held in Manitoba under *The Manitoba Assignment Act* that an assignment assigning all the real estate of the debtor "according to his estate and interest therein" was not an assignment of "all his real estate credits and effects which may be seized or sold under execution" or "words to the like effect", as it passed only the limited estate mentioned<sup>1</sup>.

Form of  
authorized  
assignment.

An assignment by a debtor under *The Ontario Assignments and Preferences Act* has been held not to void a policy of insurance containing a condition to the effect that the policy is to become void if the property insured is assigned without written permission endorsed thereon by an agent of the company<sup>2</sup>.

Effect of  
assignment  
on insurance  
policy.

An assignment for the benefit of creditors is not a "selling to any other person" within the terms of an

Assignment  
not a  
"Sale."

necessarily incidental to the exercise of control over the traffic of a federal railway . . . that it should have power to exercise control over the "through traffic": *Montreal v. Montreal St. Railway*, 1912, A. C. 333, 344. See generally on Ancillary Legislation, Lefroy. Canadian Federal System, Ch. 17; Ancillary Legislation, Clement, Canadian Constitution, 3rd edition, pp. 497-505.

<sup>10</sup> *In re White* (1920), 19 O. W. N. 26 (Orde, J.); and see *Bentley's Trustee v. Hill* (1921), 1 C. B. R. 477; 20 O. W. N. 170 (Middleton, J.); *Hamilton v. Vipond* (1921), 20 O. W. N. 214 (Logie, J.).

<sup>11</sup> *Hamilton v. Vipond* (1921), 20 O. W. N. 214 (Logie, J.). It does not appear from the report of this case whether the transaction was attacked as contrary to Dominion or Provincial Law.

<sup>1</sup> *Canadian Port Huron Co. v. Burnett* (1907), 5 W. L. R. 270.

<sup>2</sup> *Wade v. Rochester German Fire Insce. Co.* (1911), 23 O. L. R. 635.



Section 11 agreement to pay \$500 in lieu of firewood should the property be sold<sup>3</sup>.

Assignment  
for  
fraudulent  
purpose.

If there are no assets at the time of the assignment and none at the time of the application for discharge this may be evidence that the assignment is made in fraud of the Act and to defeat creditors<sup>4</sup>.

### *General Provisions Relating to Receiving Orders and Assignments.*

11 (1) Every receiving order and every authorized assignment made in pursuance of this Act shall take precedence over,—

Receiving  
orders and  
assignments  
to take  
precedence  
of attach-  
ments,  
executions,  
etc.

(a) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

(b) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor; and except also the rights of a secured creditor under section six of this Act;

but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property.

Purchaser  
in good faith  
at sale  
protected.

(2) An execution levied by seizure and sale on and of the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the authorized trustee.

<sup>3</sup> *Ryan v. Malone* (1908), 11 O. W. R. 575.

<sup>4</sup> *Thomas v. Hall* (1874), 6 U. C. P. R. 172; *Parke v. Day* (1875), 24 U. C. C. P. 619; *Hood v. Dodds* (1873), 19 Gr. 639, 644.



- (3) If an authorized assignment or a receiving order has been made, the sheriff or other officer of any court having seized property of the debtor under execution or attachment or any other process, shall, upon receiving a copy of the assignment certified by the trustee named therein or of the receiving order certified by the registrar or other clerical officer of the court which made it, forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment by the trustee of his fees and charges and the costs of the execution creditor who has a lien as in this section provided. If the sheriff has sold the debtor's estate or any part thereof, he shall deliver to the trustee the moneys so realized by him less his fees and the said costs. Section 11  
Sheriff to deliver property of debtor to trustee.
- (4) No receiving order or authorized assignment or other document made or executed under authority of this Act shall be within the operation of any legislative enactment now or at any time in force in any province of Canada relating to deeds, mortgages, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges upon property real or personal, immovable or movable; but a notice in the prescribed form of such receiving order or assignment and of the first meeting of creditors required to be called pursuant to this Act shall, as soon as possible after the making or executing of such receiving order or assignment, be gazetted, and not less than six days prior to said meeting be published in a local newspaper. Notice of assignment to be published.
- (5) The registrars of the courts of bankruptcy, the registrars of all land title and land registration offices and the recorders or clerks of all courts and offices wherein any documents *Canada Gazette* to be kept on file by registrars, recorders or clerks, and notices indexed.



Section 11

of title relating to property are, according to the provisions of this Act or of the law of a province, registered, recorded or filed, shall keep on file for public reference a copy of each issue of the *Canada Gazette* which contains any notice or notices, of, incident to or resulting from receiving orders or authorized assignments referring to bankrupts or assignors who resided or carried on business in the province wherein the said courts or offices are situated; and they shall also keep an index book wherein they shall enter alphabetically the name of each bankrupt and authorized assignor who resided or carried on business in such province prior to the date of the receiving order or assignment and in respect of whose estate a notice may at any time hereafter appear in the said *Canada Gazette*.

Fees.

(6) A fee not exceeding twenty-five cents for each search and fifty cents for each certificate may be charged by such registrar, recorder or clerk.

*Gazette*  
to be  
supplied.

(7) The King's Printer, upon request of any person who is by this Act required to keep on file for public reference a copy of the *Canada Gazette*, shall regularly supply to such person, *gratis*, two copies of every issue of such *Gazette*.

Assignment  
to be  
registered  
in proper  
registry.

(8) Every receiving order and every authorized assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate.



- (9) The proper office in this section referred to shall be the land titles office, land registration office, registry office or other office wherein, according to the law of the province, deeds or other documents of title to real or immovable property may or ought to be deposited, registered or filed. Section 11  
Proper  
registry.
- (10) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution, or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments. Precedence  
of order or  
assignment.
- (11) Every registrar or other officer for the time being in charge of such proper office to whom any trustee shall tender or cause to be tendered for registration or filing any such receiving order or authorized assignment shall register or file the same according to the ordinary procedure for registering or filing within such office documents which evidence liens or charges against real or immovable property (and subject to payment of the like fees) if at the time of the tender of such document for such purpose there be tendered annexed thereto as part thereof an affidavit substantially in the following form:— Affidavit  
upon  
registration.
- “In the matter of *The Bankruptcy Act.*”  
“Canada  
“Province of  
“I of in the province



## Section 11

Affidavit  
upon  
registration  
where title  
to real  
estate or lien  
affected.

Attestation.

Penalty for  
refusing  
to register.

- “of \_\_\_\_\_, make oath and say—  
 “That the hereunto annexed document is  
 “tendered for registration (or filing) under  
 “the authority and direction of  
 “of \_\_\_\_\_ in the Province  
 “of \_\_\_\_\_ a duly appointed  
 “trustee under *The Bankruptcy Act*.  
 “Sworn before me at.....  
 “in the province of.....  
 “this \_\_\_\_\_ day of.....19..”
- In cases where the title to real, or immovable, property, or any lien or charge upon or against that class of property, is affected by any receiving order, or authorized assignment, there shall be added to such affidavit the following words, with the incidentally necessary description and information—  
 “The annexed document affects the title to (or a lien or liens or a charge or charges upon or against, as the case may be) the following described (real or immovable) property: (add such reasonable description of each parcel affected, stating how it is affected, as may enable the registrar or other officer for the time being in charge of the proper office to identify the affected property and to discover how it is affected).”
- (12) Such affidavit may be sworn before such registrar or other officer, or before a notary public or a commissioner authorized to administer oaths for use in any of the courts of the province.
- (13) Any such registrar or other officer, who upon tender of any such receiving order or assignment or a copy thereof, certified as aforesaid, with the proper fees, and with the request that such document be registered or filed as aforesaid, shall refuse or omit to forthwith register or file the same in manner hereinbefore indicated or who shall omit or refuse to comply with the provisions of sub-



section five of this section in so far as they are applicable to him, shall be guilty of an indictable offence punishable upon indictment or summary conviction by a fine not exceeding one thousand dollars or by imprisonment for a term not exceeding one year or to both such fine and such imprisonment. Section 11

- (14) If the receiving order or authorized assignment is not registered, or filed, or if notice of said receiving order or assignment is not published within the time and in the manner prescribed by this section, an application may be made by any creditor or by the debtor to compel the registration or filing of the receiving order or assignment, or publication of such notice, and the judge shall make his order in that behalf and with or without costs, or upon the payment of costs by such person as he may, in his discretion, direct to pay the same; and such judge may, in his discretion, impose a penalty on the trustee for any omission, neglect or refusal to so register, file, or publish as aforesaid, in an amount not exceeding the sum of five hundred dollars, and such penalty when imposed shall forthwith be paid by the trustee personally into and for the benefit of the estate of the debtor. Application to compel registration.
- (15) Saving and preserving the rights of innocent purchasers for value, neither the omission to publish or register as aforesaid, nor any irregularity in the publication or registration, shall invalidate the assignment or affect or prejudice the receiving order. Assignment not invalidated by omission to register.
- (16) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the provinces of Nova Scotia and New Brunswick prior to the coming into force Existing judgments in Nova Scotia and New Brunswick.



## Section 11

Law of province to apply in favour of purchaser for value without notice.

of this Act, which became, under the laws of the province wherein it was registered, a charge, lien or hypothec upon such real or immovable property.

- (17) The law of the province in which real, or immovable, property is situate as to registration and the effect of non-registration of documents affecting title to or liens upon real, or immovable, property, shall, notwithstanding anything in this Act, apply in favour of purchasers for value without notice, to any lot of real, or immovable, property which has not been identified in manner required by subsection eleven of this section within three months after the making of the receiving order or authorized assignment whereunder any title to or interest in such lot has vested in an authorized trustee, and in cases in which the foregoing provision shall come into operation the trustee's title to or interest in such lot shall be and be deemed divested to the extent necessary to permit such provision to so come into operation.

**Cross References Act:** To Section 11(1): Staying of remedies against the property of the debtor, 6(1), 7; precedence of R. O. and A. A. in case of land, 11(10) (16); costs of execution creditor 11(10), 51(1); duty of sheriff to deliver up property, 11(3).

To sec. 11(2) Execution levied by seizure and sale, an act of bankruptcy, 3(e); stay of execution on making of R. O., 7(2); precedence of executions ousted 11(1) (10); sheriff defined, 2(hh).

To sec. 11(3) Lien of execution creditor 11(1).

To sec. 11(4) Receiving order made, 4(5); authorized assignment, 9; R. O. and A. A. to be registered, 11(8) (9); prescribed means prescribed by General Rules, 2(cc); gazetted defined, 2(q).

To sec. 11(5) Penalty for non-compliance 11(13).

To sec. 11(8) Effect of registration, 11(10); omission to register, 11(15): provincial acts relating to registration, 11(4).

To sec. 11(10) Precedence of R. O. and A. A., 11(1); registration of R. O. and A. A., 11(8); in provinces of Nova Scotia and New Brunswick, 11(16); costs of execution creditor, 11(1), 51(1).

To sec. 11(14) Registration of P. O. and A. A., 11(8) (9); publication of notice of R. O. and A. A., 11(4); judge defined, 2(u), 63(2), 64(3).

To sec. 11(15) Publication, 11(4); registration, 11 (8) (9); amendment of mistakes, 12.

**Cross References Rules:** To section 11(6) (13); fees generally, 62; to section 11(14), judge defined, 2(1).



**Cross References Forms:** Notice of R. O. or A. A. and of first meeting of creditors, 20. Section 11

**Analogous Legislation:** English Act, 1914, s. 40(1)-(2); 1890, s. 11; 1883, s. 45. Canadian Act, 1875, s. 19. *Winding-Up Act*, 1906, ss. 23, 84. Provincial Assignments Acts: R. S. O. 1914, c. 134, s. 14; R. S. M. 1913, c. 12, s. 8, as amended 1915, c. 1; N. S. 1908, c. 21, s. 1; R. S. B. C. 1911, c. 13, s. 14; R. S. S. 1909, c. 142, s. 9.

English Act, 1914, s. 40(3).

To sec. 11(2)

English Act, 1914, s. 41(1)(2). Canadian Act, 1875, s. 97. Provincial Assignments Acts: R. S. M. 1913, c. 12, s. 9; R. S. S. 1909, c. 142, s. 10.

To sec. 11(3)

English Act, 1914, s. 11, Schedule 1(1)(2); s. 53(4). Canadian Act, 1875, s. 21. Provincial Assignments Acts: R. S. O. 1914, c. 134, ss. 17, 18; R. S. M. 1913, c. 12, s. 11; R. S. N. S. 1900, c. 145, s. 12; R. S. B. C. 1911, c. 13, s. 7; R. S. S. 1909, c. 142, s. 12; Alberta 1907, c. 6, s. 11.

To sec. 11(4)

Provincial Assignments Acts: R. S. M. 1913, c. 12, s. 12; R. S. N. S. 1900, c. 145, s. 13; R. S. B. C. 1911, c. 13, s. 8; 1914, c. 3, ss. 2, 3; R. S. S. 1909, c. 142, s. 13; Alberta 1907, c. 6, s. 12.

To sec. 11(8)

Provincial Assignments Acts: R. S. M. 1912, c. 12, s. 14; R. S. B. C. 1911, c. 13, s. 12; R. S. S. 1909, c. 142, s. 15; Alberta 1907, c. 6, s. 14.

To sec. 11(14)

Provincial Assignments Acts: R. S. O. 1914, c. 134, ss. 13(14), 16, 19, 20; R. S. M. 1913, c. 12, s. 15; R. S. B. C. 1911, c. 13, s. 13; R. S. S. 1909, c. 142, s. 16; Alberta 1907, c. 6, s. 15.

To sec. 11(15)

#### ANALYSIS OF NOTES.

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Sec. 11(13) (14). Effect given to registration by section 11(10) (11).

Meaning of sec. 11(15).

Meaning of "innocent purchasers for value".

Sec. 11(16).

Section 11(1) is given in the form in which it was enacted by *The Bankruptcy Act Amendment Act, 1920*, as amended by *The Bankruptcy Act Amendment Act, 1921*<sup>5</sup>. It is difficult to see why this amendment, if it was necessary, did not mention the rights of secured creditors which have been preserved under section 10. Section 11(16) was first enacted by section 7 of *The Bankruptcy Act, 1920*. Section 11(17) was first enacted by section 55 of *The Bankruptcy Act Amendment Act, 1921*.

Receiving orders given precedence over attachments, etc., by sec. 11(1)

Although section 11(1) purports to give receiving orders and authorized assignments precedence over certain process not completely executed by payment to the execution or other creditor, the Act is not clear as to the points of time at which authorized assignments and receiving orders take precedence over them; whether from the moment of execution,<sup>6</sup> or from

<sup>5</sup> The previous section read—

11(1) Every receiving order and every authorized assignment made in pursuance of this Act shall take precedence over:

(a) All attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

(b) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor;

Receiving orders and assignments to take precedence of attachments, executions, etc.

but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching, or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property: Provided that this paragraph shall not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of this Act, which judgment, as the result of such registration, became, under the laws of the province wherein it was entered, a charge, lien or hypothec upon or of such real or immovable property.

<sup>6</sup> The rule with respect to assignments which are not given a statutory validity on execution is that the deed is revocable until the fact



the earliest moment of the day on which the receiving order is made<sup>7</sup>, or from the time of the commencement of the title of the trustee under the doctrine of relation back<sup>8</sup>. In the case of certificates of judgment, judgments operating as hypothecs, executions and attachments against land, the receiving order does not appear to obtain precedence until registration in the proper office<sup>9</sup>. Section 11

There is nothing in this section as there is in the corresponding English section<sup>10</sup>, to prevent a creditor who has notice of an available act of bankruptcy or of the presentation of a petition from speeding the completion of his process, prior at least to the making of the receiving order<sup>11</sup>; for it seems that at any time prior to the making of the receiving order the creditor may direct the sheriff to seize and sell under the execution<sup>1</sup>. Creditor may speed completion of process.

A garnishee, who under an order *nisi* (not an order absolute), pays a judgment creditor a debt due the debtor may have to pay again to the trustee if the title of the trustee relates back to cover the transaction<sup>2</sup>. Attachments.

of its execution has been communicated to a creditor: *Garrard v. Lauderdale* (1831), 2 Russ. & M. 451; *Siggers v. Evans* (1855), 21 L. J. Q. B. 355; *Ellis & Co. v. Cross* (1915), 1 H. B. R. 239; and see notes to section 9.

<sup>7</sup> *R. v. Edwards* (1854), 9 Ex. 628; *Wright v. Mills* (1859), 28 L. J. Ex. 223. and see as to non-judicial acts: *Ex parte and in re Richardson* (1838), 3 Dea. 496. and see generally *Converse v. Michie* (1865), 16 U. C. C. P. 167; distinguished on the wording of section 3(22) of 27, 28 Vic. c. 17; in *Whyte v. Treadwell* (1867), 17 U. C. C. P. 488, and *cf. per Wright J.*, in *In re and ex parte Pollard* (1903), 2 K. B. 41; 72 L. J. K. B. 509; 10 Mans. 152.

<sup>8</sup> See sections 25, 6(3), 4(10): *Fuches v. Hamilton Tribune Co.*, (1884). 10 O. R. 409.

<sup>9</sup> Section 11(10), and see in Nova Scotia and New Brunswick 11(16). As to the case of a sale by the debtor of part of his lands after a *fi. fa.* had been delivered to the sheriff, and before an assignment, see *Davidson v. Perry* (1873), 23 U. C. C. P. 346.

<sup>10</sup> Section 40.

<sup>11</sup> See section 7(2).

<sup>1</sup> See *Gillard v. Milligan* (1897), 28 O. R. 645; *Elliott v. Hamilton* (1902), 4 O. L. R. 585; *Woolford v. Levy* (1892), 1 Q. B. 772; 61 L. J. Q. B. 546; *Thordarson v. Jones* (1908), 18 M. L. R. 223; 9 W. L. R. 233; *semble*, before the making of the receiving order it is the duty of the sheriff to sell. See *per Fry and Lopes, L.JJ.*, in *Woolford's Trustees v. Levy*, *supra*, at 781, 782. On the making of the receiving order section 7(2) comes into force, and see in the case of an authorized assignment: section 13A.

<sup>2</sup> *In re Webster ex parte O. R.* (1907), 1 K. B. 623; 76 L. J. K. B. 380; 14 Mans. 20; and see *Wood v. Dunn* (1866), L. R. 2 Q. B. 73; 36 L. J. Q. B. 27.



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Debts  
garnished  
must be  
actually paid  
over to the  
creditor or  
his agent.

The provision in section 11(1)(a), that a garnished debt must be paid to the creditor or his agent, if the priority of the receiving order is to be avoided, is to be contrasted with the conditions laid down in 11(1)(b), where agent is not mentioned. Under the English Act there must be "receipt of the debt" by the creditor. It has been held under that statute that payment into court to abide further order does not constitute a "receipt of the debt" by which the attachment is completed<sup>3</sup>, nor *semble*, is an enforceable contract to pay the equivalent of a receipt<sup>4</sup>.

Attachments,  
executions  
and other  
process must  
be completely  
executed by  
payment.

The phrase "completely executed by payment to the execution or other creditor", used in section 11(1)(b), should be compared with the somewhat similar phrase in 11(10). There are other verbal differences between 11(1) and 11(10), which make interpretation difficult. Section 11(1) says nothing of process which cannot be executed by payment. The appointment of a receiver in respect of equitable interests in land is in England equivalent to execution under a writ of *elegit* in respect of legal interests, and is an actual delivery in execution<sup>5</sup>. An order *nisi* charging shares under the English Act, 1 & 2 Vic. c. 110, s. 14, is not "an execution against the goods of a debtor", within the English section, 46 & 47 Vic. c. 52, s. 45<sup>6</sup>.

As to the payment of money by the debtor to the sheriff after seizure under an arrangement made between the creditor and the debtor direct, see *Newton*

<sup>3</sup> *Butler v. Wearing* (1885), 17 Q. B. D. 182; 3 Mor. 5, but money paid into court to abide the result of an action may belong to the plaintiff so as to make him a secured creditor. See *Ex parte Navalchand in re Gordon* (1897), 2 Q. B. 516; 66 L. J. Q. B. 768; 4 Mans. 141; *In re and ex parte Pollard* (1903), 2 K. B. 41; 72 L. J. K. B. 509; 10 Mans. 152; and see cases in notes to section 2(gg). See also the remarks in *Gillard v. Milligan* (1897), 28 O. R. 645, on the question whether an execution creditor who took no active steps to enforce his execution was a secured creditor under *The Ontario Assignments Act*.

<sup>4</sup> *In re Trehearne ex parte O. R.* (1890), 60 L. J. Q. B. 50; 7 Mor. 261. Payment into Court under a garnishee order is not payment to the garnishing creditor: *In re Western Canada Flour Mills* (1921), 1 C. B. R. 390.

<sup>5</sup> *Ex parte Evans in re Watkins* (1880), 13 Ch. D. 252; 49 L. J. Bank. 7; compare on appointment of receivers: *Ex parte Taylor & Sons* (1893), 1 Q. B. 648; 62 L. J. Q. B. 392; 10 Mor. 52.

<sup>6</sup> *Ex parte Plowden in re Hutchinson* (1885), 16 Q. B. D. 515; 55 L. J. Q. B. 582; 3 Mor. 19.



v. *Foley*<sup>7</sup>. It may be that where money is paid to the sheriff to avoid a sale<sup>8</sup> the transaction is not covered by this section of the Act<sup>9</sup>. Section 11

The Supreme Court of Canada decided on the words of the Ontario enactment, which read "subject to the lien<sup>10</sup> if any of an execution creditor for his costs where there is but one execution in the sheriff's hands", that the execution creditor was entitled to all the costs of his action, and not merely the costs of the execution<sup>1</sup>. The lien of the execution creditor.

By section 2(*hh*), sheriff includes bailiff<sup>2</sup>.

Sheriff.

An execution or other creditor who becomes a secured creditor<sup>3</sup> will have a higher right than that conferred by this section. Thus an execution creditor who in foreclosure proceedings redeems and obtains an assignment of the mortgage becomes, after the taking of the new account, and the confirmation of the Master's report, a mortgagee of the lands<sup>4</sup>. Secured creditor.

Under the section of the Ontario Act corresponding to 11(1), it was held that an assignment does not

<sup>1</sup> (1911), 20 M. L. R. 519; 17 W. L. R. 105, and see under the English Act: *In re Godding ex parte Trustee* (1914), 2 K. B. 70; 83 L. J. K. B. 1222; 21 Mans. 137; *In re Pollock ex parte Wilson* (1902), 87 L. T. 238; *In re Jenkins ex parte Trustee* (1904), 90 L. T. 65; *In re Evans ex parte Salaman* (1916), 2 H. B. R. 111.

<sup>2</sup> *Stock v. Holland* (1874), L. R. 9 Ex. 147; 43 L. J. Ex. 113; 31 L. T. 121; 21 W. R. 661; *Ex parte Brooke in re Hassall* (1874), L. R. 9 Ch. 301; 43 L. J. Bank. 49; *Bower v. Hett* (1895), 2 Q. B. 51, 337; 64 L. J. Q. B. 483, 772; *In re Evans ex parte Salaman* (1916), H. B. R. 111.

<sup>3</sup> Such a payment may be a fraudulent preference, see section 31. As to whether a payment to the creditor by the execution debtor direct will be recoverable by the trustee where the payment is not accepted in full satisfaction of the debt, see *In re Ford ex parte O. R.* (1900), 1 Q. B. 264; 69 L. J. Q. B. 74; 7 Mans. 14.

<sup>4</sup> As to the nature of the lien of an execution creditor in Upper Canada prior to *The Insolvent Acts* of 1864 and 1865, see *In re Heyden* (1869), 29 U. C. Q. B. 262, and see *per Gwynne dis.*, in *Clarkson v. Ryan* (1890), 17 S. C. R. 251.

<sup>5</sup> *Clarkson v. Ryan* (1890), 17 S. C. R. 251. Compare the words of section 11(10).

<sup>6</sup> And see *Patterson v. McCarthy* (1874), 35 U. C. Q. B. 14.

<sup>7</sup> 2(*gg*).

<sup>8</sup> *Scott v. Swanson* (1907) 39 S. C. R. 229; *Adams v. Kiers* (1919), 46 O. L. R. 113. As to the practice of adding execution creditors as parties under the Act of 1869, see *Canada Landed Credit Co. v. McAllister* (1874), 21 Gr. 593. But if before the execution creditors have established their claims in the Master's Office the mortgagor has made an assignment the trustee will take the balance of the money free from any liability to satisfy the executions out of it: *Carter v. Stone* (1891), 20 O. R. 340.



**Section 11** take precedence over or destroy the preferential lien given by *The Creditor's Relief Act* to contesting creditors<sup>5</sup>. It has been held in the same province that a judgment for alimony which is registered against the lands is not within that section<sup>6</sup>.

**Sec. 11(2).** The English section corresponding with section 11(2) was enacted after the decision in *Ex parte Villars in re Rogers*<sup>7</sup>, where after hearing argument twice, the court decided that though sale by the sheriff was an act of bankruptcy, and the title of the trustee related back thereto, it related back only to the moment when the act of bankruptcy was completed, and so did not avoid the transaction. A purchaser, even if he be the execution creditor, will be protected under this section where the sale is the only available act of bankruptcy of which he has notice<sup>8</sup>.

**Sec. 11(3).**  
Sheriff to deliver property on payment of fees and costs.

By section 11(3), the sheriff is not bound to give up possession until he receives a copy of the receiving order or assignment, and is paid his fees and charges and the costs of the execution creditor<sup>9</sup>. The section provides a procedure for getting possession of the goods where the sheriff is in actual possession of the goods, or the assignee knows the sheriff has made a seizure<sup>10</sup>.

*Semble*, the sheriff is entitled to possession money down to the date of payment<sup>1</sup>. The English rule is that the sheriff is only entitled to "costs of the execution" and not entitled to possession money after the commencement of the title of the trustee or at least after notice of the receiving order<sup>2</sup>. In England also

<sup>5</sup> *Martin v. Fowler* (1912), 46 S. C. R. 119; and see *Sykes v. Soper* (1913), 29 O. L. R. 193; *Soper v. Polos* (1913), 4 O. W. N. 1258.

<sup>6</sup> *Abraham v. Abraham* (1890), 19 O. R. 259, *aff'd.*; 18 O. A. R. 436. See notes to section 11(10).

<sup>7</sup> (1874), 9 Ch. 432; 43 L. J. Bank. 76.

<sup>8</sup> *Figg v. Moore* (1894), 2 Q. B. 690; 63 L. J. Q. B. 709; 1 Mans. 404; *Burns-Burns' Trustee v. Brown* (1895), 1 Q. B. 324; 64 L. J. Q. B. 248; 2 Mans. 23, and notes to sections 3(e) and 32.

<sup>9</sup> *Smith v. Antipitzky* (1890), 10 C. L. T. Occ. N. 368; *Thordarson v. Jones* (1908), 18 M. L. R. 223; 9 W. L. R. 233.

<sup>10</sup> *Seinbane et al. v. Christopherson* (1918), 11 S. L. R. 385.

<sup>1</sup> *Smith v. Antipitzky*, *supra*; *Thordarson v. Jones*, *supra*, *q.v.*, also as to poundage.

<sup>2</sup> *In re English & Ayling* (1903), 1 K. B. 680; 72 L. J. K. B. 248; 10 Mans. 34; *Ex parte Sheriff of Essex in re Harrison* (1893), 2 Q. B. 111; 62 L. J. Q. B. 266; 10 Mor. 106.



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the estate is not liable for costs incurred by possession held by the sheriff for an unreasonable time at the request of the creditor<sup>3</sup>; *secus*, if at the request of the debtor unless the title of the trustee relates back far enough to avoid the arrangement<sup>4</sup>. Where there has been an interpleader, and sheriff's costs of possession have run during the interpleader the claimant, if he has made a vexatious claim, may be ordered to pay the costs<sup>5</sup>. *Semble*, on receipt of a copy of the receiving order and on payment to the sheriff of his fees and charges and the costs of the execution creditor the sheriff must deliver over the property even though interpleader proceedings are pending<sup>6</sup>.

"Fees" are in England only actual expenses, first of making enquiries, secondly of seizure; thirdly of mileage; fourthly of the man in possession<sup>7</sup>. Double fees cannot be charged in respect of the same goods for seizure, mileage or possession where there has been only one seizure, journey and man in possession, although different writs have been received from different creditors<sup>8</sup>.

Where the execution is in the hands of the sheriff before receiving order is made the creditor may instruct the sheriff to seize and sell<sup>9</sup>.

Duty of sheriff to seize and sell.

If the sheriff has not seized the property of the debtor, but has been paid moneys by a third party to avoid the execution, *semble*, the sheriff is under no obligation to pay the moneys over to the trustee, but must pay them over to the execution creditor<sup>10</sup>. Where

Property of the debtor.

<sup>3</sup> *Ex parte Sheriff of Essex in re Finch* (1891), 8 Mor. 284.

<sup>4</sup> *Re Beeston* (1899), 1 Q. B. 626; 68 L. J. Q. B. 344; 6 Mans. 27.

<sup>5</sup> *In re Levy ex parte Sheriff of Essex* (1890), 7 Mor. 124.

<sup>6</sup> *Ex parte Sheriff of Essex in re Harrison* (1893), 2 Q. B. 111; 62 L. J. Q. B. 266; 10 Mor. 106.

<sup>7</sup> *Glassbrook v. David & Vaux* (1905), 1 K. B. 615; 74 L. J. K. B. 492.

<sup>8</sup> *Glassbrook v. David & Vaux, supra*; *In re Wells ex parte Sheriff of Kent* (1893), 68 L. T. N. S. 231; 10 Mor. 69.

<sup>9</sup> *Gillard v. Milligan* (1897), 28 O. R. 645; *Elliott v. Hamilton* (1902), 4 O. L. R. 585; *Thordarson v. Jones* (1908), 18 M. L. R. 223; 9 W. L. R. 233; *Woolford v. Levy* (1892), 1 Q. B. 772; 61 L. J. Q. B. 546, and see notes to sections 11(1), 7(2) and 13A.

<sup>10</sup> *Bower v. Hett* (1895), 2 Q. B. 51, 337; 64 L. J. Q. B. 483, 772.



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a payment has been made to the sheriff in part satisfaction of the debt or to avoid a seizure or sale, *quære* whether these moneys are "property of the debtor" within the meaning of that phrase as used in 11(3). Compare section 11(1).

Payments  
direct to  
creditor.

Section 11(3) has no reference to payments made direct to the execution creditor by the debtor. These may in certain cases be avoided as fraudulent preferences<sup>1</sup> in others, as executions not completely executed<sup>2</sup>.

Sec. 11(4).  
Constitution-  
ality of the  
section.

Whether section 11(4), one of the most important, if not one of the most ambiguous in the Act, is valid Dominion legislation, will no doubt depend on whether it is legislation necessarily incidental to a general Bankruptcy or Insolvency Act.<sup>3</sup>

Original of  
the section.

The first part of section 11(4) seems to have been introduced from *The Manitoba Assignments Act*<sup>4</sup>, which says:—

11. No assignment made for the general benefit of creditors under this Act, shall be within the operation of "*The Bills of Sale and Chattel Mortgage Act*", but a notice of the assignment shall, as soon as conveniently possible, be published at least once in *The Manitoba Gazette*, and not less than twice in at least one newspaper having a general circulation in the judicial district in which the property assigned is situate<sup>5</sup>.

The last part of the section was enacted by section 11 of *The Bankruptcy Act Amendment Act*, 1921.

What is  
meant by  
"document."

Other "documents" which may be "made" under authority of the Act may, if these words are to be

<sup>1</sup> Section 31.

<sup>2</sup> *In re Ford ex parte O. R.* (1900), 1 Q. B. 264; 69 L. J. Q. B. 74; 7 Mans. 14, and see sections 31, 32 and 11(1).

<sup>3</sup> See notes to Chapter IV.

<sup>4</sup> R. S. M. 1913, c. 12, s. 11. The equally important section 11(15) comes from the same source.

<sup>5</sup> The original of this Manitoba section is the Ontario Amendment, 48 Vic. c. 26, s. 12(1), to *The Ontario Assignments and Preferences Act*, passed very shortly after the decision in *Robertson v. Thomas* (1885), 8 O. R. 20. See *per Osler, J., Whiting v. Hovey* (1886), 13 O. A. R. 7, 24; and *per Gwynne, J., Hovey v. Whiting* (1886), 14 S. C. R. 515, 538, 558.



given their widest interpretation, include orders<sup>6</sup> of the courts of Bankruptcy, and the appeal courts of Bankruptcy of each Province. It should be noted that it is only "documents" which are dealt with in the first part of 11(4). "Property" is dealt with by 6(3) and 10. Section 11

A document may be within the operation of an enactment in various ways; as to the effect of the execution of the document: as to the formalities required for execution; the description of the property to be conveyed or other formalities required for registration; the necessity for or obligation of registration; the effect of registration or transfer or of the lack of it<sup>7</sup>, and so forth. It is only provincial statute law which is referred to. Meaning of the phrase "shall be within the operation of any legislative enactment."

<sup>6</sup> See section 13(18), and compare 46(6).

<sup>7</sup> See *Calcott & Elwin's Contract* (1898), 2 Ch. 460. The following provisions of two Ontario Acts are given as typical of Provincial enactments which may be affected by section 11(4). R. S. O. 1914, c. 124: *The Registry Act*:—

#### REGISTRATION AND ITS EFFECT.

71(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims. Unregistered instruments after grant from the Crown to be void against subsequent registered purchaser or mortgagee.

71(2) This section shall not extend to a lease for a term not exceeding seven years, where the actual possession goes along with the lease, but it shall extend to every lease for a longer term than seven years. Exception as to certain leases.

72. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration. Actual notice.

75. The registration of an instrument under this or any former Act shall constitute notice of the instrument to all persons claiming any interest in the land, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall be the duty of a registrar not to register any instrument, except on such proof as is required by this Act. Registry to be notice.

The trustee is not regarded as a purchaser for value: *John Macdonald & Co. v. Tew* (1914), 32 O. L. R. 262; *Craig v. McKay* (1906), 12 O. L. R. 121; *Deveber v. Austin* (1875), 3 Pugs. 55. He takes no greater title to the land than the assignor can give, even though his transfer be registered prior to a mortgage previously given: *In re Wilson Estate* (1915), 33 O. L. R. 501; *Jones v. Barker* (1909), 1 Ch. 321; 78 L. J. Ch. 167; *Collver v. Shaw* (1873), 19 Gr. 599.

R. S. O. 1914, c. 126, *The Land Titles Act*, reads:—

38(1) Every registered owner may, in the prescribed manner, transfer the land or any part thereof.

(2) The transfer shall be completed by the proper Master of Titles



Section 11

The expression "relating to" is not an expression of art. The words which follow fall into two classes: those which are "documents" and those which are not, namely "property or registration of documents affecting title to, etc."

"Property." "Property", by section 2(*dd*) includes money, goods, things in action, land and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property as above defined.

"Or registration of documents affecting title to or liens or charges upon property."

Provincial enactments relating to registration of documents affecting title to property include *Registry Acts, Land Titles Acts, Chattel Mortgages and Bills of Sale Acts, Mines and Prospecting Acts*. See *The Canada Evidence Act*, R. S. C. 1906, c. 145, s. 17, as to judicial notice being taken of Provincial Acts.

Notice to be given.

The transition between the first and second parts of section 11(4), which is suggested by the conjunction "but", is extremely abrupt. It is perhaps intended to suggest that the Act gives, as a substitute for the provincial enactments covered by the apparently sweeping words of section 11(4), a general sort of notice of the receiving order or assignment (but not by this sub-section of any other document), and of the first meeting of creditors. The form of notice is given in Form 20.

Notice to be given "as soon as possible."

If that is the intention the scheme set up is in no way as effective in protecting innocent purchasers or in giving notice, as the provincial enactments. Even if the trustee mails the notices for gazetting the same day that the assignment is executed, an appreciable period is bound to elapse before the printed copies of the Canada Gazette are received by the local registrars. The Canada Gazette is printed on Fridays

entering on the register the transferee as owner of the land transferred, and until such entry is made the transferor shall be deemed to remain the owner of the land. See also sections 68(1) of the same Act; and Rule 38 under *The Ontario Land Titles Act*.



and mailed Saturdays. Copy for each issue must be in the hands of the King's printer not later than Thursday morning. If notice of an assignment is mailed on Wednesday in a town within one night's mail of Ottawa, it will not be until Monday morning that the Gazette containing the notice is received; while should the assignment have taken place on a Thursday or Friday, a period of 10 days must elapse before copies of the Gazette are received in localities adjacent to Ottawa<sup>8</sup>.

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The Canada Gazette appears to be intended as the principal means of giving notice by advertisement. See sections 2(q), 11(5)(7), 15(3), 61(5), 62(3) and 77(3)(4). As to publication, see sections 11(14)(15), 62(3). In these sections the words to gazette and to publish seem to have distinct significations.

The consideration of the provisions of the Act with respect to title falls into two divisions:—

Title under the Act.

(1) Title as between the debtor and the trustee and those who deal with either of them<sup>9</sup>.

(2) Title as between successive trustees and those who deal with them.

Questions of title as between the debtor and the trustee and those who deal with either of them fall into two classes:—

(1) Title as between the debtor and trustee.

(a) Transactions affected by the relation back of the title of the trustee.

(b) Transactions subsequent to the actual date of the receiving order or authorized assignment.

In cases where the title of the trustee relates back to avoid transactions, which the debtor had an ostensible authority to enter into, section 32 applies in certain cases to protect purchasers and others who have no notice of an available act of bankruptcy, and deal with the debtor in good faith and for adequate valuable consideration.

(a) Transactions affected by relation back of title of trustee.

In the second case, that of transactions subsequent to the date of the receiving order, other considera-

(b) Transactions subsequent to the actual date of the R.O. or A.A.

<sup>8</sup> Where no injustice has been caused by an inadvertent omission to publish, this may be cured under section 84.

<sup>9</sup> As to a secured creditor and the trustee, see 46(6).



**Section 11** tions arise. Those who framed the policy of the English Act evidently considered that when the debtor has been deprived of his property by operation of law<sup>10</sup> provision should be made for a document which should be deemed a conveyance, to satisfy the technical requirements of local law with respect to registration<sup>11</sup>.

The principal provisions of the Canadian Act with respect to property and title as between the debtor and trustee and purchasers from them subsequent to the date of the receiving order or authorized assignment, are to be found in sections 6(3), 10, 11(4)(5)(8)(9)(10)(14)(15)(17), 12, 20(3)(a) and 34(1). It is not easy to reconcile all the provisions of the Act on this matter. It will no doubt be argued that the effect of 11(4)(17) is that until three months have elapsed from the making of the receiving order or authorized assignment, it is not necessary to register the receiving order or authorized assignment or to "complete the transfer"<sup>12</sup>, in order to preserve the priority of, or to evidence the title of the trustee over an innocent purchaser for value without notice, who first registers his conveyance or "completes his transfer". There are difficulties in the way of this interpretation: the fact that the language used is not too clear, and the task of reconciling with this interpretation the saving words in 11(15). Moreover, the language used seems more capable of effecting the purpose contended for in the case of land under registry systems than in the case of land under land titles systems<sup>2</sup>. If on the other hand

<sup>10</sup> See *Selkirk v. Davies* (1814), 2 Rose 97, 291, as to notice and the necessity for it under the old law.

<sup>11</sup> Section 53(4). See, however, the Canadian section 15(3), with respect to new trustees. As to property acquired by the bankrupt subsequently to the receiving order, see section 34(1).

<sup>12</sup> See *Ontario Land Titles Act*, R. S. O. 1914, c. 126, s. 38.

<sup>2</sup> A distinction also exists between the effect of an authorized assignment and that of a receiving order. In the case of an authorized assignment the property vests in the trustee by virtue of the assignment; while in the case of a receiving order it vests in the trustee by force of the statute, which operates when the receiving order is made, that is when the order is pronounced, not when it is drawn up and signed. *Per Chitty, L.J.*, in *In re Calcott & Elvin's Contract* (1898), 2 Ch. 460; 67 L. J. Ch. 553; 5 Mans. 208; *In re Manning* (1885), 30 Ch. D. 480; 55 L. J. Ch. 613; *Blount v. Whitely*, 79 L. T. 635; 6 Mans. 48. On the appointment of a new trustee the property vests without any conveyance. See as to the provisions made to meet this case. Section 15(3).



the combined effect of 6(3), 10 and 11(4)(17) is not to vest the property of the debtor in the trustee, irrespective of the requirements of provincial law, it is clear that the effect of these sections is to vest the property of the debtor in the trustee subject to compliance with the formalities of local law<sup>3</sup>, in which case it is difficult to give a reasonable interpretation to section 11(4)(17). Section 11

Turning now to the question of title as between successive trustees and those who deal with them, it will be noted that section 15(3) provides that when a new trustee is appointed or substituted, all the property and estate of the debtor shall forthwith vest in the new trustee without any conveyance or transfer. That section goes on to state that registration of an affidavit of the trustee's appointment shall have the same effect as the registration of a conveyance or transfer to the new trustee. This matter is more fully discussed in the notes to the section:

The Dominion Parliament may impose duties on provincially appointed officers in respect of matters within Dominion authority<sup>4</sup>. The penalty for refusal to comply with this sub-section is given in 11(13). (2) Title as between successive trustees and those who deal with them.  
Sec. 11(5). Constitutionality of the section.

Section 11(5) is defective so far as it does not require the registrars, recorders or clerks to index the name of every bankrupt and authorized assignor in respect of whose estate a notice appears in the Canada-Gazette. The question whether the debtor carried on business or resided in a province is not the important one. What is important is whether he had property in the province; and this may be unknown to the trustee at the time the notice provided by Form 20 is drawn up. Defect in the section.

The form of notice provided does not make it clear whether the place of residence or the place of business or both places of residence and place of business of the bankrupt or assignor should be given. A trustee will be well advised to mention both and to specify the provinces in which he knows the debtor carried on business or had property.

<sup>3</sup> *Callender v. Colonial Secretary of Lagos* (1891), A. C. 460; 60 L. J. P. C. 33.

<sup>4</sup> *Valin v. Langlois* (1879), 3 S. C. R. 1.



### Section 11

The publication of the notice in the Gazette and in a local newspaper, and the compilation of the index required to be kept by this section, are the only means provided in the Act for notice with respect to change of title of personal property. See, however, in the case of real property section 11(8).

Sec. 11(8)(9).  
Registration  
of R.O. &  
A.A. in  
proper  
registry.

Section 11(8)(9) provides for the registration of the receiving order or authorized assignment in the land titles or land registration office in every district in which the debtor had any real estate or interest therein.

Time when  
registration  
must be made  
under  
section 11(8).

Section 11(8), which provides for the registration of the receiving order or assignment, where the debtor has real estate or immovable property, sets no time within which registration is to take place<sup>5</sup>. It is evident that registration of a true copy of the receiving order cannot be made on the very day the receiving order is made. The Act does not state that failure to register will bring into operation the Provincial Acts, which section 11(4) sought to avoid. See, however, section 11(15).

Reason for  
registration  
under Ameri-  
can Acts.

It has from time to time been held in the courts of the United States, under the Bankruptcy Acts then in force, that the reason for requiring the assignee to register the assignment is that every purchaser of land at an assignee's sale may have recourse to a certified copy of the register as a link in his chain of title, the object of registration not being to vest the title in the assignee; for he had title by virtue of the assignment, and a purchaser from the insolvent after assignment would take nothing<sup>6</sup>.

English  
practice.

The English Act, on the other hand, provides for compliance with the formalities of local laws as regards registration and transfer of title. Section 53(4) of 4 & 5 Geo. V. c. 59, reads:—

“The certificate of appointment of a trustee shall, for all purposes of any law in force in any

<sup>5</sup> See as to publication and gazetting 11(4).

<sup>6</sup> *In re Neale*, 3 B. R. 177; *Holbrook v. Coney* (1861), 25 Ill. 543; *Davis v. Anderson* (1870), 6 B. R. 145; and *cf. Brady v. Otis* (1874), 14 B. R. 345. See as to the right to compel registration, section 11(14).



part of the British Dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled and recorded accordingly”.

Section 11

The present Act does not state what is the object of the registration required by section 11(8). Registration is not required in the case of movable or personal property<sup>8</sup>. A definite effect is given to registration by section 11(10), which should be compared with section 15(3). The effect of omission to register is given in section 11(15)(17).

Scheme of present Act.

Section 11(10)(11), is the only one in the Act which gives any effect to registration of the receiving order or authorized assignment, compare section 15(3). *Semble*, the document must be accepted for registration even though unaccompanied by the affidavit required by section 4 of *The Homestead's Act*, 1920, of Saskatchewan<sup>9</sup>.

Effect given to registration by sec. 11(10)(11).

Registration will not give the assignment priority over a judgment for alimony which, when registered, has by force of the provincial statute the same effect as if the owner had created a life annuity on his lands. In such case although a judgment in form it is to be considered as a charge by deed<sup>10</sup>. Nor does the effect given to registration by section 11(10) apply to certain judgments or certificates of judgment in Nova Scotia and New Brunswick<sup>1</sup>.

As to what is meant by the phrase “completely executed by payment” in section 11(10), see notes to section 11(1). The lien mentioned in section 11(10), is for the costs of registration and sheriff's fees, and not as in 11(1), for “one only bill of costs”.

<sup>7</sup> See *In re Calcott & Elvin's Contract* (1898), 2 Ch. 460; 67 L. J. Ch. 553; 5 Mans. 208; *Callender v. Colonial Secretary of Lagos* (1891), A. C. 460; 60 L. J. P. C. 33.

<sup>8</sup> Compare in the case of Bills of Sale, Chattel Mortgages and Provincial Assignments Acts, R. S. O. 1914, c. 135, s. 2; R. S. M. 1913, c. 12, s. 11.

<sup>9</sup> *In re City Garage and Machine Co., Ltd.* (1921), 1 C. B. R. 412; 1 W. W. R. 371 (Milligan, M.T.).

<sup>10</sup> *Abraham v. Abraham* (1890), 19 O. R. 259; affd. 18 O. A. R. 436.

<sup>1</sup> 11(16).



**Section 11**      Section 11(13)(14) speaks of the omission to publish, not of the omission to gazette. Elsewhere throughout the Act a distinction is maintained between publication and gazetting. See notes to section 11(4).  
**Sec. 11(13)(14).**      The time and manner of publication are prescribed by section 11(4).  
**Meaning of Sec. 11(15).**      *The Manitoba Assignments Act*, from which section 11(15) was copied, reads:—

“15. The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment”<sup>2</sup>.

The saving clause which has been grafted on to the otherwise fairly understandable provisions of *The Bankruptcy Act*, not only introduces a great element of doubt on the whole question of title, but is itself remarkably indefinite. It is difficult to decide when the rights of innocent purchasers for value will commence. The interpretation may be that the debtor cannot convey title to such a purchaser by a sale on the day after the making of the receiving order (for that would be sooner than publication is required)<sup>3</sup>, but that he may be able to convey a good title fifteen days later (for if there is no publication or registration by that time there has been an omission to publish within the time directed by 11(4), and an omission to register within a reasonable time<sup>4</sup>). An alternative interpretation is that the debtor can convey a good title to innocent purchasers for value at any time until there has been publication in the case of personalty, and at least

<sup>2</sup> R. S. M. 1913, c. 12, s. 15.

<sup>3</sup> Note that no time is set within which registration must be made. See notes to section 11(8).

<sup>4</sup> See 11(4) and 42(1)(2). No time is given within which registration must take place. Contrast the English Act (1831), 1 & 2 Wm. IV. c. 56, ss. 25 and 26, which provided that the registration of a certificate of appointment of a trustee should have the like effect as the recording of a conveyance; provided that the title of a purchaser for value without notice of the bankruptcy, who had registered his deed previous to the registration of the certificate of appointment, should not be invalidated by reason of the vesting of the property in the trustee unless the certificate should be registered in the United Kingdom within two months from the date of appointment and within all other places within twelve months from the date of the appointment. See *Ex parte* — (1832), 1 Dea. & C. 349.



registration in the case of realty<sup>5</sup>. The difficulty with this interpretation is that the rights of innocent purchasers for value are only saved where there has been an omission to publish or register or an irregularity in the publication or registration; they are not by this paragraph 11(15) saved in the *interim* between the making of the receiving order and the time when publication or registration should take place. If they are saved in the *interim* it will be by the effect of those provincial laws which are not touched by 11(4). It should be noted that the phrase under discussion, which is "neither the omission to publish or register as aforesaid", contemplates the publication and registration which is required by the Dominion Statute and not that contemplated by any Provincial Statute. Section 11

The phrase "innocent purchasers for value" is also used in section 12; but there as the matter under discussion is the relation back of an amendment, there is much less difficulty in determining the meaning to be given to the words. Various tests of "innocence" might be suggested in applying the saving clause in section 11(15), as whether the purchaser was aware of the existence of the receiving order; or of the presentation of a petition; or of an available act of bankruptcy; or of the insolvency of the debtor; or of his reputed insolvency. Compare 11(17). Meaning of "innocent purchasers for value."

<sup>5</sup> It can be argued that registration and publication are not made notice to all the world by *The Bankruptcy Act*, and section 11(15) is not sufficient to reintroduce whatever provincial laws have been overridden by section 11(4). See as to notice under the Act of 1861: *Wood v. Dunn* (1866), L. R. 2 Q. B. 73; 36 L. J. Q. B. 27. See where the word "void" in section 47 of the Act of 1883 was construed "voidable", so as to protect *bona fide* purchasers for value in *In re Brall ex parte Norton* (1893), 2 Q. B. 381; 62 L. J. Q. B. 457; 10 Mor. 166; *In re Holden ex parte O. R.* (1887), 20 Q. B. D. 43; 57 L. J. Q. B. 47; *In re Carter & Kenderdine's Contract* (1897), 1 Ch. 776; 66 L. J. Ch. 408; 4 Mans. 34, and notes to section 29. In *In re Hart ex parte Green* (1912), 3 K. B. 6, 11; 81 L. J. K. B. 1213; 19 Mans. 334. Cozens-Hardy, M.R., said: "The Courts of Equity have for centuries refused to grant relief against a purchaser for value without notice, in whom or in a trustee for whom a legal title is vested". and see *Ex parte Brown in re Vansittart* (No. 2), (1893), 2 Q. B. 377; 62 L. J. Q. B. 279; 10 Mor. 44; *Ex parte O. R. in re Tankard* (1899), 2 Q. B. 57; 68 L. J. Q. B. 670; 6 Mans. 188, and cases cited in *Ex parte Slobodinsky in re Moore* (1903), 2 K. B. 517, 531, 532; 72 L. J. K. B. 883; 10 Mans. 341.



**Section 12** Section 11(16) was enacted by section 7 of *The Bankruptcy Act Amendment Act, 1920*<sup>6</sup>.

Amendment  
of assign-  
ment by  
Judge.

12. No advantage shall be taken of or gained by any creditor through any mistake, defect or imperfection in any authorized assignment or in any receiving order or proceedings connected therewith, if the same can be amended or corrected; and any mistake, defect or imperfection may be amended by the court. Such amendment may be made on application of the trustee or of any creditor on such notice being given to other parties concerned as the judge shall think reasonable; and the amendment when made shall have relation back to the date of the assignment or petition in bankruptcy, but not so as to prejudice the rights of innocent purchasers for value.

**Cross References Act:** Proceedings not to be invalidated by formal defects, 84; amendment of proceedings generally, 68(4); evidence of regularity of proceedings, 77 (2) (3) (4); innocent purchaser for value, 11(15), and see 13(14), 32.

**Analogous Legislation:** *Provincial Assignments Acts*, R. S. O. 1914, c. 134, s. 16; R. S. M. 1913, c. 12, s. 10; R. S. N. S. 1900, c. 145, s. 11; R. S. S. 1909, c. 142, s. 11; Alberta 1907, c. 6, s. 10; R. S. N. B. 1903, c. 141, s. 10.

This section has been introduced from *The Manitoba* or the *Ontario Assignments Act*<sup>7</sup>. Section 68(4) gives a general discretionary power of amendment, and formal defects are provided against in section 84. It will be noted that the amendment relates back to the date of the assignment or petition in bankruptcy and not to the date of the execution of the assignment<sup>8</sup>, or the date of the service of the petition<sup>9</sup>, or to the date of the presentation of the petition<sup>10</sup>.

<sup>6</sup> See under the Act of 1869 in Nova Scotia: *Deveber v. Austin* (1875), 16 N. B. R. (3 Pugs.) 55.

<sup>7</sup> R. S. M. 1913, c. 12, s. 11; R. S. O. 1914, c. 134, s. 16.

<sup>8</sup> Section 25.

<sup>9</sup> Section 4(10).

<sup>10</sup> Section 25.



It has been held that the striking out from a printed form of all reference to real estate in an assignment purporting to be under *The Ontario Assignments Act*, 48 Vic. c. 26, being an intentional act, was not such a mistake, defect or imperfection as could be remedied under section 10 of that Act<sup>1</sup>. Section 13

### *Composition, Extension or Scheme of Arrangement.*

- 13 (1) Where an insolvent debtor intends to make a proposal for,— Composition extension, or scheme of arrangement.
- (a) a composition in satisfaction of his debts; or,
- (b) an extension of time for payment thereof; or,
- (c) a scheme of arrangement of his affairs; he may, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene at the office of such trustee a meeting of such debtor's creditors, for the consideration of such proposal. In case the convening of such meeting is required after a receiving order or assignment has been made only the trustee named in such order or assignment, or his successor, shall be authorized to convene it.
- (2) The debtor shall at the time when he requires the convening of such meeting, or within such time as the trustee may then fix, lodge with the trustee,— Proceedings by debtor.
- (a) a true statement of the debtor's affairs, including a list of his creditors, which list shall show the post office address of and the amount payable to each creditor, the whole statement being verified by the

<sup>1</sup> *Blain v Peaker* (1889), 18 O. R. 109. See under the Act of 1869: *Parlee v. The Agricultural Insurance Co.* (1876), 3 Pugs. 476.



Section 13

debtor by way of statutory declaration; and,

(b) a proposal in writing signed by the debtor, embodying the terms of the proposed composition, extension or scheme and setting out the particulars of any sureties or securities proposed.

Trustee to convene meeting of creditors on proposal for composition, extension or scheme of arrangement.

(3) As soon as possible after an authorized trustee has been required to convene a meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement, he shall fix a date for such meeting and send by registered mail to every known creditor (a) at least ten days' notice of the time and place of meeting, the day of mailing to count as the first day's notice, (b) a condensed statement of the assets and liabilities of the debtor, (c) a list of his creditors and (d) a copy of his proposal. If any meeting of his creditors whereat a statement or list of the debtor's assets, liabilities and creditors was presented has been held before the trustee is so required to convene such meeting to consider such proposal and at the time when the debtor requires the convening of such meeting the condition of the debtor's estate remains substantially the same as at the time of such former meeting, the trustee may omit observance of the provisions identified as (b) and (c) in this subsection. If at the meeting so convened to consider such proposal or at any subsequent meeting of creditors a majority of all the creditors and holding two-thirds in amount of all the proved debts resolves to accept the proposal, either as made or as altered or modified at the request of the meeting, it shall be deemed to be duly accepted by the creditors, and if approved by the court shall be binding on all the creditors.



- (3a) The provisions of the five immediately next following subsections shall apply only in case the proposal of a composition, extension or scheme of arrangement is made before a receiving order or authorized assignment has been made. Section 13  
Proposal of composition or arrangement before receiving order or assignment has been made.
- (3b) At any meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement a like majority of the creditors to that which would be competent to accept the proposal may by resolution appoint a committee of not more than five persons to represent the creditors, and such committee or a majority thereof may, if the court, upon the joint application of the trustee and the debtor, shall confirm the action of the meeting, and subject to any limitations imposed from time to time by formal resolution of like majority of the creditors as aforesaid, proceed by itself, its solicitors or agents, to investigate the affairs of the debtor to the end that through the committee the creditors may be intelligently advised whether to accept or reject the proposal. The court, when it confirms the action of the meeting or subsequently thereto, may, upon the joint application of the trustee and the debtor, authorize the committee, by itself or the debtor or jointly with him, to administer and carry on the estate or business of the debtor in the interest of the creditors generally, pending acceptance or rejection by them of the debtor's proposal, or the further order of the court, and in particular,— Committee appointed to administer or carry on estate or business of debtor.  
  
Powers of committee.
- (i) To compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the debtor and any person who may have incurred any liability to the debtor, on the receipt of such sums, pay- Compromise of claims of debtor against others.



### Section 13

Compromise  
of creditors'  
claims.

Mortgage or  
pledge  
property of  
debtor.

Action of  
committee  
to be bind-  
ing upon  
creditors.

Costs and  
expenses  
fixed by court  
and payable  
out of  
debtor's  
estate.

able at such times and on such terms as may be agreed;

(ii) To compromise or otherwise arrange, as may be thought expedient, with creditors or persons claiming to be creditors, in respect of any debts provable or claims made against the debtor or his estate;

(iii) To mortgage or pledge any part or parts of the property of the debtor for the purpose of raising money for the payment of his debts or any of them or for the making of payment for goods ordered or to secure money advances made to or obtained by or for the debtor by or with the approval of the committee, for the purpose of carrying on such business; and all acts of the committee or a majority thereof and of the trustee and of the debtor done under authority of this section and by, or by the direction or with the approval of such committee or a majority thereof, but subject to such limitations as the creditors shall have imposed as aforesaid, shall be binding upon all the creditors, and in particular all debts and liabilities incurred for or by the debtor in respect of moneys borrowed or goods purchased for the purpose of continuing, by or under the direction or with the approval of such committee or a majority thereof, the business of the debtor or for the payment of claims and debts, the payment of which the committee or a majority thereof has directed or approved, shall, with the reasonable costs and expenses of the committee, and of the trustee, and of fair remuneration for the trustee's services, the whole to be fixed by the court, if the debtor shall thereafter be adjudged a bankrupt or shall make an authorized assignment, be payable out of the assets



and property of the debtor in priority to the claims of unsecured creditors. Section 13

- (3c) The creditors may, by a simple majority of those present at any meeting, revoke the appointment of any member or members of their committee and in such event, or in case of the death, resignation or absence from the province of any of the committee, may appoint another or others to act permanently or temporarily in their stead. Appoint-  
ments and  
filling of  
vacancies.
- (3d) If at any meeting of creditors to consider the proposal the chairman shall decide that any creditor has not had sufficient time to prove his claim in manner by this Act required, the chairman may accept cable or telegraphic communications as sufficient proof of the debt due to such creditor and sufficient authority to the person named or mentioned therein to vote or act for such creditor at such meeting, whereupon, as respects the proof and action of such creditors, all properly applicable provisions of this Act for the purposes of such meeting shall be deemed fully complied with. Cable or  
telegraphic  
proof of  
debts at  
meetings.
- (3e) When proceedings are taken under the immediately preceding four subsections before the making of any receiving order or authorized assignment all other applicable provisions of this Act shall apply but no document in such proceedings shall be headed "*The Bankruptcy Act*," nor shall the terms "bankrupt" or "bankruptcy" nor "assignor" or "assignment", be applied either to a person who before any receiving order or authorized assignment has been made makes a proposal for composition, extension or arrangement, nor to such proposal, unless and until the provisions of the immediately next following subsection of this Act shall have come into effect. All such documents shall be headed "In the Matter of Heading of  
documents,  
and terms  
to be used,  
under these  
proceedings.



### Section 13

If proposals not accepted, nor confirmed, debtor may be adjudged bankrupt and receiving order made.

Creditor may assent or dissent by letter.

Application for approval.

Examination of debtor.

a Proposal by . . . for a Composition", or "In the Matter of a Proposal by . . . for an Extension of Credit", or "In the Matter of a Proposal by . . . of a Scheme of Arrangement of his Affairs", as the circumstances may require.

- (3f) If as the result of proceedings instituted under the five immediately preceding subsections neither the proposal of the debtor, nor any further proposal by him or by the creditors by way of amendment is accepted, or confirmed by the court, then, notwithstanding anything in this Act, the court, unless good cause for action otherwise shall appear, shall, upon proof of such fact, and without more, upon application of the trustee or of the committee or a majority thereof, adjudge the debtor bankrupt and make a receiving order. The court may consider an offer of the debtor to forthwith execute an authorized assignment as good cause for such action otherwise.
- (4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter to that effect addressed postage prepaid and registered to the trustee, prior to the meeting, and any such assent or dissent if received by the trustee at or prior to the meeting shall have effect as if the creditor had been present and had voted at the meeting.
- (5) The trustee shall forthwith, if the proposal is accepted by the creditors, apply to the court to approve it.
- (6) If creditors who hold ten per cent. or more in amount of proved debts request the examination of the debtor, the trustee shall cause him to be examined under oath before the registrar or other officer appointed for that purpose by General Rules and his testimony to be taken down in writing. The



testimony, so taken, may be read upon the hearing of the application for the approval of the composition or scheme of arrangement. The court if not satisfied with such testimony as so taken, may direct that the debtor attend before the court for the purpose of further examination. Section 13

- (7) The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor. Court to hear report of trustee.
- (8) If the court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the court shall refuse to approve the proposal. Court may refuse to approve the proposal.
- (9) If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than fifty cents on the dollar on all the unsecured debts provable against the debtor's estate. Reasonable security.
- (10) In any other case the court (subject to the provisions of subsection sixteen of this section) may either approve or refuse to approve the proposal. Power of court.
- (11) If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposed composition, extension or scheme, or by the terms being embodied in an order of the court. Evidence of approval.
- (12) A composition, extension or scheme accepted and approved in pursuance of this



**Section 13**

Approval  
binding on  
creditors, but  
does not  
release  
debtor from  
judgments.

Provisions  
may be  
enforced.

Proceedings  
in case of  
default.

- section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable under this Act, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order or for alimony, or under a judgment against him as co-respondent in a matrimonial case or for necessities of life or alimentary debts, except to such an extent and under such conditions as the court expressly orders in respect of such liability.
- (13) The provisions of a composition, extension or scheme under this Act may be enforced by the court on application by any person interested, and any disobedience of an order of the court made on the application shall be deemed a contempt of court.
- (14) If default is made in payment of any instalment due in pursuance of the composition, extension or scheme, or if it appears to the court, on satisfactory evidence, that the composition, extension or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application by the trustee or by any creditor, adjudge the debtor bankrupt, make a receiving order against him and annul the composition, extension or scheme, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done, under or in pursuance of the composition, extension or scheme. Where a debtor is adjudged bankrupt under this subsection, any debt provable in other respects, which has been contracted before the adjudication, shall be provable in the bankruptcy.



- (15) All parts of this Act shall, so far as the nature of the case and the terms of the composition, extension or scheme admit, apply thereto as if the terms "trustee," "bankruptcy," "bankrupt," "assignment," "authorized assignment," "assignor," "authorized assignor," "order" and "order of adjudication" included respectively a composition, extension or scheme of arrangement, a compounding, extending or arranging debtor and an order approving the composition, extension or scheme. Section 13  
Definitions.
- (16) No composition, extension or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt or authorized assignor. Priority of  
debts.
- (17) The acceptance by a creditor of a composition, extension or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt. Effect of  
acceptance.
- (18) Where a debtor has been adjudged bankrupt or has made an authorized assignment, and the court subsequently approves the composition, extension or scheme, it may make an order annulling the bankruptcy or authorized assignment and vesting the property of the debtor in him or in such other person as the court may appoint on such terms and subject to such conditions, if any, as the court may declare. Court may  
make order  
annulling  
bankruptcy  
or assign-  
ment.
- (19) Notwithstanding the acceptance and approval of a composition, extension or scheme, it shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents, (as, for the purposes solely of Composition  
not binding  
in certain  
cases  
without  
assent.



**Section 13**

proceedings relating to a composition, extension or scheme he may, notwithstanding anything in this Act, so assent) to such composition, extension or scheme.

**Cross References Act:** Section 13(1) Insolvent defined, 2(jj); debtor defined, 2(o); making of R. O., 4(5); of A. A., 9.

To sec. 13(2): Statement of affairs, 54(1)(2); offence in relation to, 89(f); proof of debt, 45.

To sec. 13(3): Proof of debt, 45; trustee may at any time call meeting, 42(3); offence of making a false claim, 92; carrying on business, 5(2), 20(1)(b), 27.

To sec. 13(6): Examination of debtor, 56.

To sec. 13(7): Report of trustee, 58(3); is *prima facie* evidence under sections 59 and 60, see section 60(2).

To sec. 13(8): Cases where court required to refuse discharge, 58(5).

To sec. 13(9): Cases where court required to refuse or suspend or attach conditions, 58(5) and 59.

To sec. 13(12): Debts provable, 44; release of debtor by discharge, 61; composition, extension or scheme to bind the Crown, 86.

To sec. 13(16): Priority of claims, 51.

To sec. 13(17): Partners and sureties not released by order of discharge, 61(3); no release from penalty for criminal offence, 94.

To sec. 13(18): Annulment of adjudication, 62; returns to Dominion Statistician, 24(2)(b).

To sec. 13(19): Debts not discharged by an order of discharge, 61; approval of composition brings no exemption from criminal liability, 94. Stay of proceedings, 13A.

**Cross References Rules:** Form of proposal, 98; notice to creditors, 99; opposed application, 100; hearing and appeal, 101; costs of application, 102; evidence and order, 103; correction of formal slips, 104; vesting of property when composition annulled, 105; proof of debts in composition, 106; examination of debtor, 131 to 134.

**Cross References Forms:** Proposal for a composition, 23; proposal for an extension of time or scheme, 24; notice to creditors where debtor submits offer of composition, extension or scheme, 21; voting letter, 22; resolution accepting composition, 25; resolution accepting extension or scheme of arrangement, 26; order appointing day for hearing, 27; notice to creditors of application to court to approve composition, extension or scheme, 28; report of authorized trustee on proposal for composition, extension or scheme, 29; order approving composition or scheme, 30; order refusing to approve composition, extension or scheme, 31; proof of debt, 47, 48; appointments for examination of debtor, 62; declaration by shorthand writer, 63; notes of examination of debtor or others, 64; application to be by motion, 14.

**Analogous Legislation:** English Act, 1914, ss. 16, 17, 21; Canadian Act, 1875, ss. 49 to 60.

**ANALYSIS OF NOTES.**

Distinction between composition, scheme and extension.

Distinction between composition and receiving order as regards property affected.

Acceptance and approval of composition gives debtor all rights of ownership.

Order approving composition equivalent to discharge.



## Section 13

Composition in case of partnership.

Time when proposal may be made.

Motive of those voting on the proposal.

Report of the trustee.

Court may refuse to approve the composition—

Terms not reasonable or not calculated to benefit the general body of creditors.

Cases in which the court is required to refuse discharge.

Facts on which the court required to refuse, suspend or attach conditions to discharge.

Where the scheme provides reasonable security for the payment of not less than 50c. on the dollar.

Other cases in which the court may approve or refuse.

Refusal followed by adjudication.

When the composition is approved it binds dissentient creditors.

Differences between a discharge and the approval of a composition.

Power to adjudicate when default is made—

No relation back of title of trustee.

Effect on surety.

Effect of section 13(15).

Section 13(17).

Section 13(18).

Section 13(19).

Section 13(3) is in the form enacted by *The Bankruptcy Act Amendment Act, 1921*<sup>1</sup>. Sections 13 (3a) to 13(3f) were first enacted by *The Bankruptcy Act Amendment Act, 1921*. Sections 13(3a) to 13(3f) appear to make possible the carrying on of the business of the debtor in a wider way than that provided by section 20(1)(b).

Where a debtor keeps his assets and undertakes to pay over to the creditors a certain sum, that is a composition; while if he makes over his assets to be administered by a trustee that is a scheme<sup>2</sup>. It may be that an extension will have features in common

Distinction between composition, scheme and extension.

<sup>1</sup> The previous section read:—

13(3). The trustee shall, when so required, convene a meeting of creditors, and shall, at least ten days before the meeting, send to each creditor a notice of the time and place of such meeting and a copy of the debtor's statement of affairs and of his proposal; if at such meeting a majority in number of creditors who hold two-thirds in amount of the proved debts resolve to accept the proposal, either as made or as altered or modified at the request of the meeting, it shall be deemed to be duly accepted by the creditors, and if approved by the Court shall be binding on all the creditors.

<sup>2</sup> *In re Griffith* (1886), 3 Mor. 111. As to the difference between a composition and an assignment, see *Grundy v. Johnston* (1896), 28 O.R. 147. For the general powers of the court in composition proceedings, see section 63 and *In re Littler ex parte Manchester and Liverpool District Banking Co.* (1874), L. R. 18 Eq. 249; 43 L. J. Bank. 73; where it was held under the Act of 1869, that the court had no jurisdiction to order a sale at the instance of an equitable mortgagee. For an example of a scheme, see *In re Morter ex parte Nichols* (1897), 76 L. T. 532.



**Section 13** with the arrangements known as a Letter of License or a Deed of Inspectorship. Such arrangements are not necessarily acts of bankruptcy<sup>3</sup>.

Distinction between composition and receiving order as regards property affected.

A composition or scheme of arrangement, though approved by the Court and so by statute binding on all the creditors, is at bottom only a contract between the parties. It thus differs essentially from a receiving order. Under a composition or scheme of arrangement, after-acquired property is not brought in unless the contract says so<sup>4</sup>. In the absence of such a provision and of words indicating an intent to define exactly the property to be taken by the trustee, the property of the debtor divisible among his creditors<sup>5</sup> will, it is considered, be the property to which the debtor was entitled at the date of the approval of the scheme by the Court when it became completely operative<sup>6</sup>. Such property would probably include a reversionary interest whether vested or contingent, but not a mere expectancy<sup>7</sup>.

Acceptance and approval of composition gives debtor all rights of ownership.

The effect in England of the acceptance and approval of a composition is to give the debtor all rights of ownership and disposition over his property to such an extent that a purchaser from him is not bound to inquire as to the payment of instalments under the composition<sup>8</sup>. Therefore the debtor may, at least where the composition provides that he is to carry on the business, pledge the assets in order to raise money for the purpose of the business, or for the purpose of paying the composition; but he may not after the date of the approval of the composition in a case where the terms of the composition do not authorize it,

<sup>3</sup> Forsyth, the Law Relating to Composition with Creditors, 2nd edition 1844, pp. 2-7.

<sup>4</sup> *In re Croom, England v. Provincial Assets Co.* (1891), 1 Ch. 695, 705; 60 L. J. Ch. 373.

<sup>5</sup> Sections 13(15) and 25.

<sup>6</sup> *In re Croom, England v. Provincial Assets Co.*, *supra*, at 705.

<sup>7</sup> *S. C. and ex parte Dawes in re Moon* (1886), 17 Q. B. D. 275; 3 Mor. 105; *In re and ex parte Clarke* (1884), 13 Q. B. D. 426; 53 L. J. Ch. 1063; 1 Mor. 143.

<sup>8</sup> *In re Kearley & Clayton's Contract* (1878), 7 Ch. D. 615; 47 L. J. Ch. 494; *In re McHenry ex parte McDermott* (1888), 21 Q. B. D. 580; *Ex parte Burrell in re Robinson* (1876), 1 Ch. D. 537, 547; 45 L. J. Bank. 68. Under the English practice composition proposals are considered only after a receiving order has been made. The English receiving order does not vest the debtor's property in the trustee. See English sections 16 and 17.



pledge the assets as an indemnity to the surety against his liability in respect of the composition<sup>9</sup>, though *semble* he may before the acceptance of the composition agree with the surety to indemnify him against liability by depositing goods with him and if there is nothing inconsistent therewith in the terms of the composition such an agreement may be good<sup>10</sup>.

If there is nothing to the contrary in the composition or scheme, such as the fixing of a date for the discharge of the debtor, the order approving the composition or scheme is equivalent to a discharge<sup>1</sup>, but not to the extent of permitting the debtor to agree with a creditor after the date of the order, but before the composition has been fully paid, to pay the creditor in full<sup>2</sup>.

It was repeatedly held under previous Canadian Acts that in the case of a partnership the only composition for which provision was made was one extending to both partners and including all the creditors of the firm and of the individual members<sup>3</sup>. Such a deed was required to provide for separate as well as joint creditors\* unless there were no separate creditors<sup>5</sup>. Consequently a deed made only with an insolvent's partnership creditors was not binding on an individual creditor<sup>6</sup>. The Rules are silent on this matter.

*Quære* whether when there are partnership and individual creditors there must be a consent of the necessary number and value of each class<sup>7</sup>.

Section 13(1) appears to give a wide latitude as to the time when a proposal for a composition may be made.

<sup>9</sup> *In re Simmons ex parte Allard* (1881), 16 Ch. D. 505.

<sup>10</sup> *Ex parte Burrell in re Robinson* (1876), 1 Ch. 537; 45 L. J. Bank.

68.

<sup>1</sup> *In re Croom, England v. Provincial Assets Co.*, *supra*; *In re and ex parte Clark* (1884), 13 Q. B. D. 426; 53 L. J. Q. B. 1063; 1 Mor. 143; and see sections 13(12), 61.

<sup>2</sup> *In re Andrews ex parte Barrow* (1881), 18 Ch. D. 464; 50 L. J. Ch. 821.

<sup>3</sup> *In re Walker* (1878), 2 O. A. R. 265; *Gelinas v. Drew* (1877), 3 Q. L. R. 361; *In re Code and Crain* (1879), 3 O. A. R. 555.

<sup>4</sup> *Re Garratt* (1869), 28 U. C. Q. B. 266; *Allan v. Garratt* (1870), 30 U. C. Q. B. 165; *McKittrick v. Haley* (1881), 46 U. C. Q. B. 246.

<sup>5</sup> *Preston v. Hunton* (1875), 37 U. C. Q. B. 177.

<sup>6</sup> *Pigeon v. Martin* (1875), 25 U. C. C. P. 233.

<sup>7</sup> *Sanderson v. Dixon* (1878), 29 U. C. C. P. 377. There is no rule covering such a case.

Order approving composition, equivalent to discharge.

Composition in case of partnership.

Time when proposal may be made.



**Section 13** made under the Act<sup>8</sup>. The Act makes no specific provision for advertisement in composition proceedings if these take place before the making of an authorized assignment. As cases may arise where creditors' names have been omitted from the list furnished to the trustee, advertisement is necessary<sup>9</sup>. If the Court considers the proofs tendered require investigation or if for a large proportion of the debts shown no proofs have been tendered, the Court will no doubt refuse to approve the composition<sup>10</sup>.

Motive of those voting on the proposal.

The creditors who assent must be *bona fide* creditors entitled to prove<sup>1</sup> and must assent in the *bona fide* belief that it is in the interest of all creditors to do so; and not from some other motive<sup>2</sup>. Thus, if the assent of a creditor whose consent is necessary to make up the required majority is obtained by a promise made not by the debtor, but by a third party such as the trustee to pay him his law costs, the composition will not be affirmed<sup>3</sup> and it has been held under a former English Act that where the numbers are sufficient without reckoning those whose assent has been im-

<sup>8</sup> See English Act, 1914, ss. 14, 21. For a review of legislation and the practice under *The Insolvent Act* of 1869, see *Green v. Swan* (1872), 22 U. C. C. P. 307. In the United States of America compositions may be proposed only in bankruptcy proceedings actually commenced. Collier on Bankruptcy, 11th edition, 1917, p. 311. It should be noted that section 13(3) speaks of the "proved debts". See, however, Rule 106.

<sup>9</sup> See under the Act of 1875: *Sanderson v. Dixon* (1878), 29 U. C. C. P. 377, and see as to creditors residing at a distance, *Lewis v. Tudhope* (1877), 27 U. C. C. P. 505, 520.

<sup>10</sup> *In re and ex parte Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159. See Rule 106.

<sup>1</sup> *Lewis v. Tudhope* (1877), 27 U. C. C. P. 505, 520. See as to the offence of making a false claim, section 92. See where a secured creditor mentioned his security in his proof, and voted in respect of his whole debt: *In re Littler ex parte Manchester & Liverpool District Banking Co.* (1874), L. R. 18 Eq. 249; 43 L. J. Bank. 73. It was held in that case that as the resolutions for which the creditor voted did not call for a surrender of the security of secured creditors, the creditor might retain his security. See as to the right of a secured creditor to revalue his security: *In re Morter ex parte Nichols* (1897), 76 L. T. 532. As to an election to proceed with an action at law where part of the debt was provable and part not, see *In re Edwards ex parte Baum* (1874), L. R. 9 Ch. 673; 44 L. J. Bank. 25. There was no election such as would prevent the creditor from continuing an action, where he had proved under an invalid composition: *Allan v. Garratt* (1870), 30 U. C. Q. B. 165.

<sup>2</sup> *In re McCruc* (1877), 1 O. A. R. 387.

<sup>3</sup> S. C.



properly obtained, the Court will not approve the composition where any of the untainted signatures are subsequent to the tainted ones; as the creditors who signed subsequently may have been induced to do so by seeing the signatures of the others<sup>4</sup>. *A fortiori* a creditor may not appear to concur in a composition and stipulate for a secret benefit for himself<sup>5</sup> even though his secret benefit is promised in return for his becoming surety for the payment of the composition<sup>6</sup>; for a composition is an agreement between the debtor and each creditor that they are contracting on terms of equality<sup>7</sup>. Nor may the creditor after the approval of the composition but before it is paid in full accept payment in full of his debt even where he agrees at the same time to give the debtor fresh credit<sup>8</sup>. But a deed may contain a clause stating that the composition "shall not affect any mortgage, hypothec, lien or collateral security held by any such creditor as security for his debts."<sup>9</sup> And where such a clause appears a creditor whose claim is secured by mortgage is not bound to communicate that fact to other creditors before executing the deed<sup>10</sup>. But a creditor who, in composition proceedings, holds out to the other creditors that he is not a secured creditor may afterwards be estopped from setting up that he is a secured creditor.<sup>1</sup> It was held under a former Canadian Act that where there has been no statutory majority there is no discharge<sup>2</sup>. Creditors

<sup>4</sup> *Phillips v. Dicus* (1812), 15 East 248; *Holland v. Palmer* (1797), 1 B. & P. 95.

<sup>5</sup> *Jackman v. Mitchell* (1807), 13 Ves. 581; *McKewan v. Sanderson* (1875), L. R. 20 Eq. 65; *Sinclair v. Henderson* (1864), 9 L. C. J. 306.

<sup>6</sup> *Wood v. Barker* (1865), L. R. 1 Eq. 139; 35 L. J. Ch. 276.

<sup>7</sup> *Daughlish v. Tennent* (1866), L. R. 2 Q. B. 49; 36 L. J. Q. B. 10. Contrast annulment cases, where each creditor is at liberty to make his own bargain: *In re McHenry, McDermott v. Boyd* (1894), 3 Ch. 385; 64 L. J. Ch. 13.

<sup>8</sup> *In re Andrews ex parte Barrow* (1881), 18 Ch. D. 464; 50 L. J. Ch. 821.

<sup>9</sup> *Henderson v. Macdonald* (1873), 20 Gr. 334; and see *In re Stern* (1875), 37 U. C. Q. B. 296, and *Jackman v. Mitchell* (1807), 13 Ves. 581, 586.

<sup>10</sup> *Henderson v. Macdonald*, *supra*, but see *In re Balbirnie ex parte Jameson* (1876), 3 Ch. D. 488; 45 L. J. Bank. 156.

<sup>1</sup> *In re Balbirnie ex parte Jameson*, *supra*.

<sup>2</sup> *Lewis v. Tudhope* (1877), 27 U. C. C. P. 505, 521; *cf. Sanderson v. Dixon* (1878), 29 U. C. C. P. 377, and see further as to formalities:



## Section 13

who in order to give the debtor the benefit of section 13(9) have executed releases for their debts and delivered them as escrows to take effect upon the approval of the scheme by the Court, may not vote on the scheme<sup>3</sup>. It is no fraud which will vitiate a composition for the debtor to make the composition for a less amount than he might have made it for if pressed; it would be otherwise if he induced the creditors to accept a small composition by concealing his assets<sup>4</sup>. The composition approved by the Court must be the same as that which the creditors accept<sup>5</sup>. If the creditors have varied the proposal of the debtors the consent of the debtors to the variation must be shown<sup>6</sup>.

## Report of the trustee.

It is the duty of the trustee to report fully to the Court<sup>7</sup>. Where in his opinion the proposal of the debtor is reasonable and calculated to benefit the creditors that will not justify him in not disclosing facts or conduct on the part of the debtor which the Court ought to have before it in order to apply the provisions of this section<sup>8</sup>. The Court will tolerate no interference with the trustee in the preparation of his report<sup>9</sup>. In England the report of the official receiver is *prima facie* evidence of the statements contained in it<sup>10</sup>. The debtor's statement of affairs which

*Allan v. Garratt* (1870), 30 U. C. Q. B. 165; as to the effect of a mistake, see *Rooney v. Lyon* (1877), 40 U. C. Q. B. 366; *affd.* 2 O. A. R. 53; Section 9(13) of *The Insolvent Act* of 1864, provided that a composition obtained by fraud should be null and void. It was, therefore, possible to allege in answer to a plea of discharge under the Act, that there was a corrupt agreement between the debtor and some of the parties to the deed: *Thompson v. Rutherford* (1868), 27 U. C. Q. B. 205, and see *Shaw v. Massie* (1871), 21 U. C. C. P. 266.

<sup>3</sup> *In re Baines* (1902), 86 L. T. 691; and see *In re Pilling ex parte Board of Trade* (1903), 2 K. B. 50; 72 L. J. K. B. 392; *In re Keet* (1905), 1 K. B. 278; 74 L. J. K. B. 694; 12 Mans. 235.

<sup>4</sup> *Shaw v. Massie* (1871), 21 U. C. C. P. 266.

<sup>5</sup> *Lucas v. Martin* (1888), 37 Ch. D. 597; 57 L. J. Ch. 261, and see Rule 104.

<sup>6</sup> *In re Richardson* (1921), 1 C. B. R. 417; 19 O. W. N. 494 (Holmested, R.).

<sup>7</sup> *In re and ex parte Bottomley* (1893), 10 Mor. 262; *In re Richardson* (1921), 19 O. W. N. 494.

<sup>8</sup> *In re and ex parte Bottomley* (1893), 10 Mor. 262.

<sup>9</sup> *In re and ex parte Bottomley*, *supra*.

<sup>10</sup> *In re Wallace ex parte Campbell* (1885), 15 Q. B. D. 213; 54 L. J. Q. B. 382; 2 Mor. 167; *In re and ex parte Reed and Bowen* (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 3 Mor. 90. See *The Bankruptcy Act*, sections 60 (2) and 13(15).



has been lodged with the trustee under section 13(2) must be filed prior to the application to the court for approval<sup>11</sup>. The trustee may apply in person for the approval of the composition. He need not apply by a solicitor<sup>12</sup>.

On an unopposed application to confirm a composition, the registrar must be satisfied that the required majority of creditors has duly accepted the composition, that the terms are reasonable and calculated to benefit the general body of creditors, and that no facts have been proved which would justify the court in withholding its approval<sup>1</sup>.

Under sections 13(8)(9)(10) the court is to exercise a judicial discretion which will not be interfered with on appeal<sup>2</sup> unless the appeal court is clearly satisfied that it is wrong<sup>3</sup>. On appeal the court is entitled to take into account facts which might have been but were not before the registrar when he gave his decision<sup>4</sup>. All the facts must be considered in deciding the question; and the fact that the creditors are in favour of the proposal is but one of the facts to be considered<sup>5</sup>. The court must not be unduly influenced by that fact,<sup>6</sup> for the court itself having the duty of saving careless creditors from the effect of their carelessness must be satisfied that the proposal is reasonable and calculated to benefit the general body of

Court may refuse to approve the composition.

<sup>11</sup> *In re Richardson* (1921), 1 C. B. R. 417; 19 O. W. N. 494 (Holmested, R.). Rule 97.

<sup>12</sup> *In re Shaw* (1921), 1 C. B. R. 368; 19 O. W. N. 153 (Holmested, R.).

<sup>1</sup> *In re Richardson* (1921), 1 C. B. R. 417; 19 O. W. N. 494 (Holmested, R.); *In re Rubin* (1921), 1 C. B. R. 394 (Cordeau, R.); *In re Miller* (1921), 1 C. B. R. 396 (Lamarre, D.R.).

<sup>2</sup> *In re Wallace ex parte Campbell* (1885), 15 Q. B. D. 213; 54 L. J. Q. B. 382; 2 Mor. 167.

<sup>3</sup> *In re Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159; *In re and ex parte Reed and Bowen* (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 3 Mor. 90; *In re Stanier ex parte Smith* (1888), 20 Q. B. D. 544; 5 Mor. 67; *Ex parte Kearsley in re Genese* (1886), 18 Q. B. D. 186; 56 L. J. Q. B. 220; 3 Mor. 274; *Ex parte Merchant Banking Co. in re Durham* (1881), 16 Ch. D. 623; 50 L. J. Ch. 606.

<sup>4</sup> *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 472; 61 L. J. Q. B. 591; 9 Mor. 133.

<sup>5</sup> *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 473; 61 L. J. Q. B. 591; 9 Mor. 133.

<sup>6</sup> *In re Wallace ex parte Campbell* (1885), 15 Q. B. D. 213; 54 L. J. Q. B. 382; 2 Mor. 167.



**Section 13** creditors<sup>7</sup>. The weight to be given to the opinion of creditors will, no doubt, vary in different cases.<sup>8</sup> But if the scheme is reasonable and calculated to benefit the general body of creditors, as those phrases have been judicially interpreted, and if the case is outside the prohibitions in section 13(8)(9), the court will generally approve.<sup>9</sup>

Terms not reasonable or not calculated to benefit the general body of creditors.

In order to be reasonable the scheme must give the creditors a greater advantage than they would have . . . . in proceedings in bankruptcy<sup>10</sup>, though it is competent for the scheme in certain cases to provide that particular sections of the Act shall not apply<sup>1</sup>. Where the alleged advantage consists in the withdrawal of certain claims, satisfactory evidence of the amount of the debts and the reason for their being given up will have to be adduced before the court will approve<sup>2</sup>. It is not a reasonable provision in a scheme that the committee of inspection shall determine the time when the debtor shall be discharged, for this removes the matter from the control of the court<sup>3</sup>, though a provision that the creditors shall give the debtor his discharge either immediately or at some definite time, subject to the approval of the court, would be a proper provision<sup>4</sup>.

<sup>7</sup> *In re and ex parte Reed and Bowen* (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 3 Mor. 90.

<sup>8</sup> *In re and ex parte Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159; *In re Webb ex parte Board of Trade* (1914), 3 K. B. 387, 393; 83 L. J. K. B. 1386; 21 Mans. 169; *In re and ex parte Flew* (1905), 1 K. B. 278, 284; 74 L. J. K. B. 284; 12 Mans. 1; *In re Stanier ex parte Smith* (1888), 20 Q. B. D. 544; 5 Mor. 67.

<sup>9</sup> See further notes to these sections *infra*.

<sup>10</sup> *Ex parte Bischoffsheim in re Aylmer* (1887), 19 Q.B.D. 33; 56 L.J.Q.B. 460; 4 Mor. 152.

<sup>1</sup> Such as section 23 of the English Act of 1890 regarding the rate of interest: *In re Nepean ex parte Ramchand* (1903), 1 K. B. 794; 72 L. J. K. B. 407; 10 Mans. 156; and see *In re Athlumney ex parte Wilson* (1898), 2 Q.B. 547; 67 L.J.Q.B. 935.

<sup>2</sup> *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 474; 61 L. J. Q. B. 591; 9 Mor. 133; *In re Pilling ex parte Board of Trade* (1903), 3 K. B. 50; 72 L. J. K. B. 392; 10 Mans. 142; *In re and ex parte Flew* (1905), 1 K.B. 278; 74 L.J.K.B. 284; 12 Mans. 1.

<sup>3</sup> *Ex parte and in re Clark* (1884), 13 Q.B.D. 426; 53 L.J.Q.B. 1063; 1 Mor. 143.

<sup>4</sup> *In re and ex parte Clark, supra*; *In re Croom. England v. Provincial Assets Co.* (1891), 1 Ch. 695; 60 L. J. Ch. 373. The question may yet be further litigated whether the Court should compel a dissentient minority to accept a composition which gives one creditor an advantage over the others. See *In re Howe* (1921), 20 O. W. N. 244; *In re Gardner* (1921), 1 C. B. R. 424.



Assent might be refused if the composition had the effect of injuring one class to the advantage of another<sup>5</sup>. Section 13

By section 58(5) the court is required to refuse the discharge of a bankrupt where he has committed any offence under the Act or any offence connected with his bankruptcy or assignment or the proceedings thereunder, unless for special reasons the court otherwise determines. Cases where the court would have to refuse a discharge in order to guard the morality of the trade will justify the court in refusing approval of a scheme which would be reasonable as far as the creditors were concerned and calculated to benefit the general body of creditors<sup>6</sup>.

The facts on proof of which the court is required to refuse, suspend or attach conditions to the discharge of the debtor are referred to in section 58(5) and set out in section 59. Where the composition provides the security mentioned by 13(9) and is otherwise unobjectionable, the court will not generally refuse to sanction the scheme merely on the ground that the misconduct alleged is rash and hazardous speculation, unless the speculations have been so wild or so continued or of such a character as to make it against public policy that a man who might be described as a confirmed gambler should get a scheme sanctioned at all<sup>7</sup>.

But where facts have been proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the court has no discretion to approve the scheme unless it provides the reasonable security required by section 13(9)<sup>8</sup>; and even though

<sup>5</sup> *In re Code and Cain* (1879), 3 O. A. R. 555.

<sup>6</sup> *In re and ex parte Reed and Bowen* (1886), 17 Q. B. D. 244, 251; 55 L.J.Q.B. 244; 3 Mor. 90.

<sup>7</sup> *In re E. A. B.* (1902), 1 K. B. 457; 71 L. J. K. B. 356; 9 Mans. 105; *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 474; 51 L. J. Q. B. 591; 9 Mor. 133; *Ex parte Merchant Banking Co. in re Durham* (1881), 16 Ch. D. 623; 50 L.J. Ch. 606; *In re and ex parte Bottomley* (1893), 10 Mor. 262; *In re Barlow ex parte Thornber* (1886), 3 Mor. 304; *In re and ex parte McTear* (1888), 5 Mor. 182.

<sup>8</sup> *In re Webb ex parte Board of Trade* (1914), 3 K. B. 387; 83 L. J. K. B. 1386; 21 Mans. 169.



**Section 13** there is reasonable security for the payment the court is not bound to approve the scheme, but has a discretion in the matter<sup>9</sup>. The fact that the creditors wish for it, or (in England) that the official receiver is satisfied, are only two of the facts to be considered<sup>10</sup>. The court has to form its own conclusion on all the circumstances<sup>1</sup>. The clause "reasonable security for payment," means reasonable security for payment now or within a short time, not at a distant time such as a year hence<sup>2</sup>. Reasonable security does not mean absolutely good security, but a reasonably good security under which the requisite amount of money could probably be recovered<sup>3</sup>. Debts provable in 13(9) mean debts provable at the moment when the scheme comes up for approval, not at the date of the receiving order. Thus debts which have been withdrawn and released after the receiving order but before the time of approval of the composition are not to be reckoned<sup>4</sup>, at least where absolutely and finally released, that is not released as part of the scheme<sup>5</sup>.

Other cases  
in which the  
Court may  
approve or  
refuse.

The court will not refuse its sanction to a scheme merely on the ground that by act of a third party and without the knowledge of the debtor certain creditors withdrew their debts on terms which gave them an advantage over creditors<sup>6</sup>. The case would be different if the arrangement were made by the debtor<sup>7</sup>. It

<sup>9</sup> *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467; 51 L. J. Q. B. 591; 9 Mor. 133.

<sup>10</sup> *In re Webb ex parte Board of Trade*, *supra*.

<sup>1</sup> *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 473; 51 L. J. Q. B. 591; 9 Mor. 133.

<sup>2</sup> *In re and ex parte Paine* (1891), W. N. 208.

<sup>3</sup> *In re Webb ex parte Board of Trade*, *supra*; *In re and ex parte Bottomley* (1893). 10 Mor. 262.

<sup>4</sup> *In re E. A. B.* (1902), 1 K. B. 457; 71 L. J. K. B. 356; 9 Mans. 105.

<sup>5</sup> *In re Pilling ex parte Board of Trade* (1903), 2 K. B. 50, 59; 72 L. J. K. B. 392; 10 Mans. 142; and see *In re Burr ex parte Board of Trade* (1892), 2 Q. B. 467, 477; 51 L. J. Q. B. 591; 9 Mor. 133. See generally as to conditional releases in *In re E. A. B.*, *supra*; *In re Baines* (1902), 86 L. T. 691; *In re Pilling ex parte Board of Trade*, *supra*; *In re and ex parte Flew* (1905), 1 K. B. 278; 74 L. J. K. B. 280; 12 Mans. 1.

<sup>6</sup> *In re E. A. B.* (1902), 1 K. B. 457; 71 L. J. K. B. 356; 9 Mans. 105.

<sup>7</sup> *In re Pilling ex parte Board of Trade* (1903), 2 K. B. 50, 59; 72 L. J. K. B. 392; 10 Mans. 142.



has also been said that the court should regard the moral aspect of the case and not give its approval where the composition is intended to prevent the investigation of discreditable or possibly fraudulent transactions<sup>8</sup>. It is left to the discretion of the court when a composition appears reasonable to determine whether the conduct of the debtor is such as to make it more expedient in the interest of the public or of commercial morality to punish him than to consult only the interest of the creditors<sup>9</sup>.

Section 13

In England when the court refuses to approve of a composition an immediate adjudication of bankruptcy will be made against the debtor only in exceptional circumstances<sup>10</sup>.

Refusal followed by adjudication.

By section 13(12) an approval of the composition by the court binds the dissentient creditors<sup>1</sup> so far as relates to debts provable under the Act. Section 44 defines what debts are provable under the Act<sup>2</sup>.

When the composition is approved it binds dissentient creditors.

Provided he carries out the terms of the composition as approved by the court the debtor is, as has been already pointed out, practically in the same position as if he had received his discharge. Section 86 provides that save as provided in the Act the effect of a composition or scheme of arrangement shall bind

Differences between a discharge and the approval of a composition.

<sup>8</sup> *Ex parte Strawbridge in re Hickman* (1883), 25 Ch. D. 266; 53 L. J. Ch. 323.

<sup>9</sup> *Ex parte Kearsley in re Genese* (1886), 18 Q. B. D. 168; 56 L. J. Q. B. 220; 3 Mor. 274; *Ex parte Strawbridge in re Hickman* (1883), 25 Ch. D. 266; 53 L. J. Ch. 323; *In re and ex parte Bottomley* (1893), 10 Mor. 262; *In re Barlow ex parte Thorner* (1886), 3 Mor. 304; *In re and ex parte McTear* (1888), 5 Mor. 182.

<sup>10</sup> *In re and ex parte Flew* (1905), 1 K. B. 278; 74 L. J. K. B. 284; 12 Mans. 1.

<sup>1</sup> It is the intention that all creditors except those referred to in section 13(19), shall be bound and shall also be entitled to the benefits under the scheme. See *per Gwynne, J.*, in *Shaw v. Massie* (1871), 27 U. C. C. P. 266, 269. The creditors to benefit are not merely those who first agreed to the proposal. Therefore a secured creditor who makes no claim for a year and then overvalues his security is entitled to revalue it and prove for the balance: *In re Morter ex parte Nichols* (1897), 76 L. T. 532. In that case the trustees of the scheme who had given promissory notes to secure the composition of 7 shillings 6 pence in the pound could not be called on by the secured creditor to make up the two dividends on the composition which he had lost by his delay.

<sup>2</sup> See under previous Insolvent Acts as to costs incurred subsequently to the approval of the scheme: *Tate v. Charlebois* (1870), 14 L. C. J. 215, and see as to an execution on a judgment obtained after that date: *In re McMillan* (1877), 13 U. C. L. J. 105.



**Section 13** the Crown. There are, however, certain differences between section 13(12) and section 61 which deals with discharges<sup>3</sup>. Alimentary debts<sup>4</sup>, for example, are not mentioned in section 61. On the other hand certain debts not mentioned in 13(12) are not released by an order of discharge. These include debts or liabilities incurred by means of a fraudulent breach of trust. By 13(19) the rights of the creditor with respect to such a debt are not taken away by the composition unless he assents to the composition, which may be done by proving for and accepting the composition<sup>5</sup>. The acceptance of a composition does not release third parties such as sureties who would not be released by an order of discharge of the bankrupt<sup>6</sup>. The provisions of the Act must be strictly complied with or dissentient creditors will not be bound. Thus where there had not been the statutory majority it was held under a previous Canadian Act that there was no discharge<sup>7</sup>. A debtor may in some cases be estopped from setting up a composition<sup>8</sup>.

Power to  
adjudicate  
when default  
is made.

The power of adjudication given by section 13(14) is discretionary and will not be exercised if the court can see plainly that there are no other assets which the creditors can get hold of, and that the creditors will not be in a better position if there is an adjudication. But the court will exercise the power if there is only a probability that the creditors will gain by an adjudication<sup>9</sup>. The court can adjudge the debtor bankrupt,

<sup>3</sup> Under the Act of 1883. the composition was binding on all creditors as far as related to debts and liabilities which would be released by an order of discharge: *Flint v. Barnard* (1888), 22 Q. B. D. 90; 58 L. J. Q. B. 83.

<sup>4</sup> Defined, 2(b).

<sup>5</sup> *In re Sewell, White v. Sewell* (1909), 1 Ch. 806; 78 L. J. Ch. 432; 16 Mans. 113. See where there was an election to proceed at law and not to claim a composition in respect of what might have been recovered in an action: *In re Edwards ex parte Baum* (1874), L. R. 9th 673; 44 L. J. Bank. 25. See also as to election *Allan v. Jarratt* (1870), 30 U. C. Q. B. 165.

<sup>6</sup> 13(17).

<sup>7</sup> *Lewis v. Tudhope* (1877), 27 U. C. C. P. 505, 521; *Cf. Sanderson v. Dixon* (1878), 29 U. C. C. P. 377, as to the effect of a mistake, see *Rooney v. Lyon* (1877), 40 U. C. Q. B. 366; *affd.* 2 O. A. R. 53.

<sup>8</sup> *Pigeon v. Martin* (1875), 25 U. C. C. P. 233.

<sup>9</sup> *In re and ex parte Moon* (1887), 19 Q. B. D. 669; 56 L. J. Q. B. 496; 4 Mor. 263.



make a receiving order against him, and annul the composition when the debtor without any fraud over-estimated the value of the assets and misled the creditors in consequence of which the creditors receive a less dividend than the debtor led them to expect<sup>10</sup>. Section 13

*Semble* where an adjudication and a receiving order are made under 13 (14) there is no relation back of the title of the trustee<sup>1</sup>. No relation back of title of trustee.

An order under this section annulling a composition, adjudicating a debtor bankrupt and making a receiving order against him, discharges a surety who has given security for the payment of the composition<sup>2</sup>. Effect on surety.

Section 13(15) has not been as carefully drawn as certain other sections in the Act. It is the result of an attempt to compress subsections 17 and 18 of section 16 of the English Act into one subsection. Under the English Act it is only certain portions of the Act which extend to compositions, extensions and schemes<sup>3</sup>. Extremely wide as the terms of this paragraph appear to be intended to be, it will not give the parties power to confer on the court a jurisdiction which it does not otherwise possess<sup>4</sup>. Reading 13(15) and 25(1) together it appears that the property of the debtor which passes to the trustee under a scheme is, in the absence of words indicating a contrary intention, all the property of the debtor at the date of the acceptance of the scheme and up to the date of its approval by the court<sup>5</sup>. Effect of sec. 13 (15).

<sup>10</sup> *In re and ex parte Moon* (1887), 19 Q. B. D. 669; 56 L. J. Q. B. 496; 4 Mor. 263; *In re Webster ex parte Foster* (1886), 3 Mor. 132.

<sup>1</sup> *In re McHenry ex parte McDermott* (1888), 21 Q. B. D. 580; 36 W. R. 725.

<sup>2</sup> *Walton v. Cook* (1888), 40 Ch. D. 325; 58 L. J. Ch. 180. Contrast section 13(17).

<sup>3</sup> Compare English section 16(17) (18). See also English cases on previous Acts: *Ex parte Whinney in re Grant* (1886), 17 Q. B. D. 238; 55 L. J. Q. B. 369; 3 Mor. 118, the right to examine a debtor: *Ex parte Bischoffsheim in re Aylmer* (1887), 19 Q. B. D. 33; 56 L. J. Q. B. 460; 4 Mor. 152, on provisions in a composition for the discharge of the debtor.

<sup>4</sup> *Ex parte Bischoffsheim in re Aylmer* (1887), 20 Q. B. D. 258; 57 L. J. Q. B. 168.

<sup>5</sup> *In re Croom. England v. Provincial Assets Co.* (1891), 1 Ch. 695; 60 L. J. Ch. 373.



**Section 13A** Section 13(17) preserves the liability of third parties such as sureties.<sup>6</sup>

**Sec. 13(17).** A discharge of a debtor under a composition is much the same as a discharge in bankruptcy by operation of law; and the consent of a creditor under the Act is not of the same effect as a voluntary consent to the discharge of a debtor. If, therefore, the debtor being an acceptor of a bill of exchange is discharged under a composition he is discharged by operation of law and the drawer is not thereby discharged<sup>7</sup>.

**Sec. 13(18).** The granting of a bankrupt's application for the approval of a composition and the annulment of the adjudication is entirely within the discretion of the court. The creditors are entitled to consideration, but the conduct of the debtor must also be considered, and where it is in the interest of the public and of commercial morality that the bankruptcy should not be annulled, the proposed composition will not be approved even though it would have been advantageous to the creditors<sup>8</sup>.

**Sec. 13(19).** Section 13(19) must be distinguished from section 13(17) which preserves the liabilities of third parties. See also notes to section 13(12).

Stay of proceedings pending consideration of proposal of composition, extension or scheme of arrangement.

13A. (1) The court, at any time after a debtor has required an authorized trustee to convene a meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement, may, on the *ex parte* application of the trustee and his affidavit disclosing the circumstances and stating his belief that the success of the intended efforts to bring into effect a composition, extension of time for payment, or scheme of arrangement

<sup>6</sup> *In re Sewell, White v. Sewell* (1909), 1 Ch. 806; 16 Mans. 113; see section 31(3); as to the discharge of the debtor see 13(19).

<sup>7</sup> *In re and ex parte Jacobs* (1875), L. R. 10 Ch. 211; 44 L. J. Bank. 34. See as to the dissolution of a company, payment of interest on whose debentures had been guaranteed: *In re Fitzgeorge ex parte Robson* (1905), 1 K. B. 462; 74 L. J. K. B. 322; 12 Mans. 14. See under *The Insolvent Act of 1875*; *Fowler v. Perrin*, 16 U. C. C. P. 258; *Martin v. Brummell*, 4 U. C. P. R. 229; 4 U. C. L. J. N. S. 137; *In re Stern*, 37 U. C. Q. B. 296.

<sup>8</sup> *In re and ex parte Beer* (1903), 1 K. B. 628; 72 L. J. K. B. 366, and see notes to section 62.



of the debtor's affairs and obligations will be imperilled unless, pending consideration by the creditors of the proposal made or to be made the existing conditions as to litigation of claims against the debtor is preserved, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last mentioned court, upon or before report made of the result of the dealings between the debtor and his creditors, shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on like application and proof, stay such proceedings until the court having jurisdiction in bankruptcy shall otherwise order.

Section 13A

- (2) On the making of an authorized assignment or an order approving a proposal of a composition, extension or scheme of arrangement every such action, execution or other proceeding for the recovery of a debt provable in authorized assignment or composition, extension or scheme of arrangement, proceedings under this Act shall, subject to the rights of secured creditors to realize or otherwise deal with their securities stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

Proceedings stayed on making of assignment or order approving proposal, except as to secured creditors.

**Cross References Act:** Composition, extension or scheme 13; authorized assignment 9; stay of proceedings on making of receiving order, 6(1), 7.

Section 13A was first enacted by section 12 of *The Bankruptcy Act Amendment Act*, 1921. Its provisions are not as wide as those with respect to receiving orders; for while 13A substantially copies section 7, it does not contain any provisions similar to those in



Section 13A section 6(1). That section provides that after the making of a receiving order no creditor other than a secured creditor shall have any remedy against the property or person of the debtor or shall commence any action unless with the leave of the court.

Before the enactment of section 13A, the court on application of the trustee and inspectors, no creditor objecting, authorized the payment of the plaintiff's costs in an action brought against the debtor after an authorized assignment had been made<sup>1</sup>.

The rights of secured creditors are preserved in subsection 2 of this section; but no mention is made of secured creditors in subsection 1. Different considerations may, however, apply where the court is asked under subsection 1 to stay proceedings by secured creditors from those applicable in the case of proceedings by unsecured creditors.

The rights of secured creditors are further preserved by section 10. Under that section an assignment only vests the property subject to the rights of secured creditors; therefore in the case of mortgaged property the trustee takes only what the debtor owned, namely, the equity of redemption in the property<sup>2</sup>.

In mechanics' lien proceedings the claimant is a secured creditor under his lien; but it is customary for the lienholder to seek a personal judgment for the amount of his claim which he can enforce in the event of his lien not realizing the full amount which he is entitled to be paid. While it may be that section 13A does not require the leave of the court to the commencement of mechanics' lien proceedings, leave of the court will now probably be required where the lienholder is seeking to enforce his claim to a personal judgment<sup>3</sup>.

There was nothing in *The Insolvent Acts* of

<sup>1</sup> *In re Prima Skirt Co., Ltd.* (1921), 1 C. B. R. 394 (Panneton, J.). In this case the estate had obtained the benefit of the attachment made by the plaintiffs. The inspectors and trustee may have been acting under section 20(1) (g) or 20(1) (i).

<sup>2</sup> *White & Company v. The "Iona"* (1921), 1 C. B. R. 415 (Hodgins, L.J.).

<sup>3</sup> See *In re Rockland Chocolate and Cocoa Co., Ltd.* (1921), 1 C. B. R. 452 (Orde, J.), a decision prior to the enactment of this section.



1869 or 1875 to take away the right of a creditor to sue a debtor, who had made an assignment or against whom a writ of attachment had been issued; and a debtor who was arrested on a *capias ad respondendum* after assignment, by a creditor who had proved on his estate, was said to have no remedy but an application to the Judge in Insolvency for discharge from custody under the 145th section of the Act of 1869<sup>4</sup>. The general rule under the old English statutes was that a creditor might not prove unless he stayed his action, but it was also a well established rule that a creditor who had proved and had received dividends was not held to have made his election; but might refund the dividends and proceed at law<sup>5</sup>. Hagarty, C.J.O., in *Mason v. Macdonald*<sup>6</sup>, expressed the opinion that the law was similar under *The Insolvent Act* of 1869, saying: "It would seem, therefore, that at all events before the 49th Geo. III., and under our statute, the fact of having proved a claim in bankruptcy was not necessarily a bar to an action at law for the same claim; subject, of course, to the refunding of any dividend received, and to the possible expunging of the proof".

<sup>4</sup> *Hegan v. Jones* (1874), 2 Pugs. 290; and see *Beaudin v. Roy* (1873), 20 L. C. J. 308; 5 Rev. Leg. 232; *Stevenson v. McOwan* (1867), 3 L. C. L. J. 38; *Robertson v. Hale* (1877), 21 L. C. J. 38; see *The Insolvent Act*, 1875, sections 39 and 90.

<sup>5</sup> *Ex parte Capot* (1739), 1 Atk. 219; *Ex parte White* (1792), 2 Ves. Jr. 9.

<sup>6</sup> (1880), 45 U. C. Q. B. 113, 124, 125.

<sup>7</sup> See also *Baldwin v. Peterman* (1866), 16 U. C. C. P. 310; 2 U. C. L. J. N. S. 128; *Thorne v. Torrance* (1866), 16 U. C. C. P. 445; (1868), 18 U. C. C. P. 29, and contrast *Archibald v. Haldan* (1870), 30 U. C. Q. B. 30, on section 50 of the Act of 1869.



## PART III.

## TRUSTEES AND ADMINISTRATION OF PROPERTY.

*Appointment of Trustees.*

Section 14  
Appointment  
of trustees.

14 (1) The Governor in Council may, upon application made to the Secretary of State of Canada, appoint sufficient fit and qualified persons to be trustees in bankruptcy and under authorized assignments and in proceedings by insolvent debtors to secure compositions, extensions and arrangements under this Act.

Limited  
jurisdiction.

(2) Every such trustee shall be appointed with authority limited territorially to the whole or part of some one or more bankruptcy districts or divisions but he shall, for the purpose of obtaining possession of, and realizing upon, the assets of a bankrupt or authorized assignor of whom he is trustee, have power to act as such anywhere. Trustees appointed pursuant to this section are in this Act referred to as "authorized trustees."

Application.

(3) Every person who applies to be appointed an authorized trustee shall state in his application full particulars of his qualifications, ability and previous business experience.

General  
security to  
be given by  
trustee.

(4) No authorized trustee shall accept any assignment or trust or execute any duties under this Act unless and until he has given security to the satisfaction of the Governor in Council, by bond or otherwise, executed to his Majesty as represented by such departmental officer as may be designated by the Governor in Council, for due accounting



and for payment over and transfer of all moneys and property received by him as such trustee. If the security required is provided in cash the trustee shall be entitled to be paid thereon such interest as may be prescribed by General Rules. Section 14

- (5) Such departmental officer shall be a special trustee for the creditors and for the estate. Special trustee.
- (6) The amount of such security shall not, at any time, be less than ten thousand dollars. Security.
- (7) The said bond shall be kept in force by the trustee until such time as the appointment of the trustee is revoked or until he resign such appointment, and until the Governor in Council is satisfied that all moneys and properties received by the trustee have been duly accounted for and paid over to the parties entitled thereto, whereupon such bond shall be released and discharged. Security to be kept in force.
- (8) If a majority of the creditors present at any meeting duly called require the trustee to provide further security the trustee shall, within thirty days after the making of the receiving order or authorized assignment, or forthwith if first required after the elapse of such period, give security by bond or otherwise to the registrar of the court in the bankruptcy district or division of the debtor's locality in the amount required by the creditors, for the due accounting and payment over and transfer of all property received or to be received by the trustee as such in respect of the estate of the debtor. The expense incident to the furnishing of such security may be charged by the trustee to the estate of the debtor. Additional security to be given by trustee.
- (9) Should the trustee be unable or fail to give the security required, in the manner and within the time hereinbefore provided, he shall within ten days from the expiration of the said thirty days, by notice in writing, Meeting to be called if security not given.



## Section 14

New trustee appointed.

- convene a meeting of creditors for the purpose of appointing a new authorized trustee, and should he neglect or refuse to call such meeting, he shall be guilty of an offence and subject to the penalties provided by this Act.
- (10) In case the trustee fails to give the security provided by this section and a new trustee is not appointed by the creditors, the court may, on the application of any creditor, appoint from among the available authorized trustees a new trustee.

**Cross References Act:** Trustee defined, 2(jj); districts and divisions, 64(5); trustees under R. O., 6(2); under A. A., 9; under C. E. or S., 13(1)(c); proceedings in what court, 4(4)(11); jurisdiction of courts, 63(1); courts auxiliary to one another, 71(2); new trustee, 15; trustee not bound to act, 15(3); official name of trustee, 16; duties and powers of trustee, 17 to 24; discharge of, 41; penalty for not providing bond, 96(b); or calling meeting, 96(c); defects or irregularity in appointment of trustees not to vitiate acts done in good faith, 84(2); remuneration of trustee, 40; resolution of creditors, 2(ff), 2(z); 42(14) as to whether trustee may vote, 42(17)(19); the Act to be administered by the Minister of Justice, 99.

**Cross References Rules:** Trustee defined, 2(1); discharge of, 107 to 110; interest on deposit, 147; applications to court 4, 14 to 19.

**Cross References Forms:** Bond to registrar under section 14(8), F. 36; notice of meeting to appoint new trustee 32; resolution to appoint or substitute another authorized trustee, 33; application for discharge, 42; affidavit verifying application, 43; order discharging authorized trustee, 44.

**Analogous Legislation:** Canadian Acts 1875, ss. 27, 28, 29; 1865, ss. 5, 6. Provincial Assignments Acts, see R. S. O. 1914, c. 134, s. 7.

## ANALYSIS OF NOTES.

Who may be a trustee.  
Application to Secretary of State.  
Notice of appointment.  
Limited jurisdiction.  
Security required by section 14(4).  
Additional security under section 14(8).  
Creditors may resolve to dispense with further security.  
Penalties for breach of sections 14(9) (10).

Section 14(8) is in the form in which it was enacted by section 15 of *The Bankruptcy Act Amendment Act, 1921*<sup>10</sup>.

<sup>10</sup> The previous section read:—

14. (8) Unless the creditors, either at the first meeting, or at a meeting convened by notice to all the known creditors, resolve to dispense with further security, the trustee shall give security by bond or otherwise to the registrar of the Court in the bankruptcy district or



The practice before the amendment of section 2(*aa*) in 1921 was to appoint either individuals or companies as trustees under *The Bankruptcy Act*<sup>11</sup>. Section 14

Application should be made to the Secretary of State of Canada by letter<sup>1</sup>. Application to Secretary of State.

When appointment is made the applicant will be Notice of appointment.

division of the debtor's locality, in an amount satisfactory to the registrar, for the due accounting and payment over and transfer of all moneys and properties received or to be received by him as such trustee in respect of the estate of such debtor, and such security shall be given within thirty days of the date of the receiving order or the making of the assignment. The expense incident to the furnishing of such security may be charged by the trustee to the estate of the debtor.

<sup>11</sup> "Person" is defined in section 2(*aa*). A company could not be an assignee under *The British Columbia Creditor's Trust Deed Act: Colonial Development Company v. Beach* (1913), 19 B. C. R. 237.

<sup>1</sup>The form of letter is as follows:—

#### THE BANKRUPTCY ACT.

.....  
(Place and date)

The Right Honourable,  
The Secretary of State of Canada,  
OTTAWA.

SIR: I have the honour to hereby make application for appointment as an authorized Trustee under section 14 of *The Bankruptcy Act*, chapter 36, 9-10 Geo. V. I subjoin a statement of my qualifications for such appointment.

Name in full .....  
Address or place of business .....  
Profession .....  
Where practised .....

Age .....  
Qualifications and experience .....

References .....

\* Surety Company .....

I have the honour to be, sir,  
Your obedient servant,  
Signature .....

\* The Bond under section 14 of the Act is not required to be filed unless and until appointment is made.



**Section 14** notified to this effect by letter from the Secretary of State. The names and addresses of persons appointed to be authorized trustees appear from time to time in the *Canada Gazette* as appointments are made.

**Limited jurisdiction.** The authority of the trustee is limited territorially. The same principle of limited jurisdiction was in previous Canadian Acts. It is a principle which occasionally causes difficulty<sup>2</sup>.

**Security required by sec. 14(4).** If the applicant proposes to furnish a bond for the general security required by section 14(4), he should give in his letter of application to the Secretary of State the name of the surety company which he proposes should furnish the bond<sup>3</sup>. The bond need not accompany the application, not being required until appointment is made.

<sup>2</sup> See on the Act of 1864: *Johnston v. Barker* (1869), 20 U. C. C. P. 228.

<sup>3</sup> The names of Surety Companies eligible to furnish bonds to trustees under *The Bankruptcy Act*, as of the date of going to press are:—Alliance Assurance Company, Limited, T. D. Belfield, Chief Agent, Montreal.

The Canada Accident & Fire Assurance Company, T. H. Hudson, Manager, Montreal.

The Canadian Surety Company, Wm. H. Hall, General Manager, Toronto.

The Dominion Gresham Guarantee & Casualty Company, R. Welch, General Manager, Montreal.

The Dominion of Canada Guarantee & Accident Insurance Company, Charles A. Withers, Manager, Toronto.

The Employers' Liability Assurance Corporation, Limited, C. W. I. Woodland, Chief Agent, Montreal.

The General Accident Assurance Company of Canada, T. H. Hall, General Manager, Toronto.

The Globe Indemnity Company of Canada, John Elmo, General Manager, Montreal.

The Guarantee Company of North America, Henry E. Rawlings, Managing Director, Montreal.

The Guardian Insurance Company of Canada, H. M. Lambert, Managing Director, Montreal.

The Imperial Guarantee & Accident Insurance Company of Canada, E. Willans, Managing Director, Toronto.

London Guarantee & Accident Company, Limited, Geo. Weir, Chief Agent, Toronto.

The London & Lancashire Guarantee & Accident Company of Canada, Alexander MacLean, Manager, Toronto.

The Northern Assurance Company, Limited, Gt. E. Moberly, Chief Agent, Montreal.

The Ocean Accident & Guarantee Corporation, Limited, W. T. Perry, Chief Agent, Toronto.

Railway Passengers Assurance Company, Frank H. Russell, Chief Agent, Toronto.

Scottish Metropolitan Assurance Company, Limited, Alexander Bissett, Chief Agent, Montreal.



The amount of the security required by section 14 Section 14  
(4) has been fixed at \$15,000<sup>4</sup>. The bond is to be executed to Thomas Mulvey, Under-Secretary of State<sup>5</sup>.

<sup>4</sup>See P. C. 1489: Certified copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor-General on the 5th July, 1920.

The Committee of the Privy Council have had before them a report, dated 24th June, 1920, from the Secretary of State, submitting that persons appointed authorized Trustees under section 14 of *The Bankruptcy Act*, are required to furnish security to the amount of at least \$10,000, and to execute a bond in favour of a Departmental Officer to be designated in guarantee for a due discharge of their duties.

The Minister, therefore, recommends that the attached form of bond to be furnished by authorized Trustees appointed under section 14 of *The Bankruptcy Act*, be approved.

The Minister further recommends upon due consideration of the responsibility involved, that the amount of security to be furnished shall be fixed at \$15,000, and that in accordance with sub-section 4 of section 14 of *The Bankruptcy Act*, Thomas Mulvey, Under-Secretary of State and Deputy Registrar-General of Canada, be designated as the officer to whom the bond shall be executed on behalf of His Majesty.

The Committee concur in the foregoing recommendations and submit the same for approval.

(Sgd.) Rodolphe Boudreau,  
Clerk of the Privy Council.

The Right Honourable,  
The Secretary of State.

<sup>5</sup>P. C. 1489, *supra*. The approved form of Bond is as follows:—

#### CANADA,

#### THE BANKRUPTCY ACT.

KNOW ALL MEN BY THESE PRESENTS that we .....  
..... of the ..... of .....  
in the Province of .....  
hereinafter called the Principal, and .....  
hereinafter called the Surety, are jointly and severally bound unto our  
Sovereign Lord the King, His Heirs and Successors, represented by  
Thomas Mulvey, Under-Secretary of State, in the sum of ..... law-  
ful money of Canada to be paid to our Sovereign Lord the King, His  
Heirs and Successors, represented as aforesaid, for which payment well  
and faithfully to be made, we bind ourselves and each and every of our  
respective heirs executors, administrators, successors and assigns, jointly  
and severally firmly by these presents.

Sealed with our respective seals, and dated at the .....  
of .....  
in the province of ..... this .....  
day of ..... 192....

Whereas the Principal has applied to be appointed an authorized trustee under "*The Bankruptcy Act*," and when so appointed will be authorized and empowered to act as an authorized trustee in bankruptcy and under authorized assignments, and in proceedings by insolvent debtors to secure compositions, extensions and arrangements under the said Act, and this bond is given in pursuance of the said Act and amendments thereto.

Now the condition of this obligation is such that upon the granting of such appointment, the said Principal shall, if he acts as an authorized



**Section 14** Moneys or securities may be deposited with the Secretary of State in lieu of a bond\*.

trustee under the said Act, duly account for and pay over and transfer to the parties entitled thereto all moneys and properties received by him as such authorized trustee and shall faithfully perform his duties as such authorized trustee, then this obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

The surety agrees to pay any and all claims under this bond within sixty days after proof of claim shall have been furnished.

Provided always that if the surety shall at any time give three calendar months' notice in writing to the Principal and to the Secretary of State of Canada, for the time being, of its intention to put an end to the suretyship hereby entered into, then this bond and all accruing responsibility on its part and of its funds and property shall from and after the last day of such three calendar months aforesaid cease and determine in so far as concerns any acts or deeds of the principal subsequent to such determination, remaining liable, however, hereon for all or any deeds, acts or defaults done or committed by the Principal as authorized trustee as aforesaid from the date of this bond up to such determination.

IN WITNESS WHEREOF the Principal

.....

WITNESS

.....

and the Surety has

.....

.....

CANADA	} In the matter of <i>The Bankruptcy Act</i> and	
Province .....		the appointment of
county of .....		as an authorized Trustee.

To Wit:

I, ..... of the City of .....  
 ..... in the County of .....  
 ..... make oath and say that:—

1. I was personally present and did see the within Surety Bond duly signed and executed by the said .....

2. The said Bond was executed at the City of .....  
 ..... aforesaid.

3. I know the said .....

4. I am a subscribing witness to the said Bond.

SWORN before me at the City of .....

In the County of .....

the ..... day of .....

A.D. 19....

.....

A Commissioner, etc.

\* P. C. 1758: Certified copy of a Report of the Committee of the



In addition to this general security, the trustee may be required to furnish the additional security called for by section 14(8) in each matter in which he acts as trustee<sup>7</sup>. Section 15  
Additional security under sec. 14(8).

The creditors may resolve to dispense with further security. This may be done by ordinary resolution carried as provided by section 42(14)<sup>8</sup>. As to right of trustee to vote on such a resolution, see 42(17)(19)<sup>9</sup>. Creditors may resolve to dispense with further security.

The only penalties for breach of the provisions of section 14(9)(10) are those contained in section 96. Penalties for breach of sections 14(9)(10).

15 (1) Creditors constituting a majority in number of those who have proved debts of twenty-five dollars or upwards and holding half or more in amount of the proved debts of twenty-five dollars or upwards may, at their discretion, at any meeting of creditors, New trustee may be substituted.

Privy Council. approved by His Excellency the Administrator on the 29th July, 1920.

The Committee of the Privy Council have had before them a report, dated 20th July, 1920, from the Secretary of State, submitting that, by section 14 of *The Bankruptcy Act*, it is provided that authorized trustees shall give security to the satisfaction of the Governor-in-Council, by bond or otherwise, and that it is desirable that the form of security if given otherwise than by bond should be clearly defined.

The Minister, therefore, recommends that the security to be furnished under the above section of *The Bankruptcy Act* shall, if not given in the form of bond or cash, be by deposit of securities of such classes and descriptions as trustees may invest in under the Provincial laws relating to trustees and executors of the Province for which such trustees may be appointed.

The Committee concur in the foregoing recommendation and submit the same for approval.

(Sgd.) Rodolphe Boudreau,  
Clerk of the Privy Council.

The Right Honourable  
The Secretary of State.

<sup>7</sup> As to the rights of bondsmen of the general security where additional security should be taken out and is not: Cf. *Letourneau v. Dansereau* (1886), 12 S. C. R. 307; *Armstrong v. Forster* (1884), 6 O. R. 12. In the last mentioned case it was suggested under *The Insolvent Act* of 1875, that the sureties to a general security are discharged by payment to anyone who recovers judgment against them.

<sup>8</sup> See section 2(f), 2(z).

<sup>9</sup> Where under the Act of 1875, the majority in value of creditors voted one way as to the appointment of an assignee and the majority in number another way, there was not a "default in appointment." and the case was properly brought before the judge, under section 102 of that Act: *In re Harris* (1876), 12 C. L. J. 251.



Section 15

substitute any other authorized trustee acting for or within the same bankruptcy district or division for the trustee named in the receiving order or to whom an authorized assignment has been made.

## Removal

- (2) An authorized trustee may be removed and another substituted or an additional authorized trustee may be appointed for cause, by the court.

Property  
of debtor to  
vest in new  
trustee.

- (3) When a new trustee is appointed or substituted, all the property and estate of the debtor shall forthwith vest in the new trustee without any conveyance or transfer, and he shall gazette a notice of the appointment or substitution and register an affidavit of his appointment in the office of the registrar of the court from which the receiving order was issued, or in the case of an authorized assignment, in every office in which the original assignment or copy or counterpart thereof was lodged, registered or filed. Registration of such affidavit in any land registration district, land titles office, registry office or other land registration office, or lodging or filing such affidavit as aforesaid, shall have the same effect as the registration, lodging or filing of a conveyance or of a transfer to the new trustee.

Remunera-  
tion of  
removed  
trustee.

- (4) The new trustee shall pay to the removed trustee, out of the funds of the estate, his proper remuneration and disbursements, which shall be ascertained as provided by section forty of this Act.

Trustee  
not bound to  
act unless  
tendered fees  
and  
disburse-  
ments.

- (5) No authorized trustee shall be bound to accept an authorized assignment or to act as trustee in matters relating to assignments or receiving orders or to compositions, extensions, or arrangements by debtors, if, in his opinion, the realizable value of the property of the debtor is not sufficient to provide the necessary disbursements and a



reasonable remuneration for the trustee, Section 15  
 unless and until the trustee has been paid or  
 tendered a sum sufficient to defray such dis-  
 bursements and remuneration.

**Cross References Act:** Proof of debts, 45, 46; ordinary resolution, 2(z), 42(14); special resolution 2(ii); bankruptcy districts and divisions, 64(5); limited territorial authority of trustees 14(2); new trustee appointed on failure to furnish security, 14(9)(10); property vesting in trustee, 6(3), 10, 25; passing of property, 6(3), 10, 11(4), 20(3)(a); duties of trustee, 17 *et seq.*; remuneration of trustee, 40.

**Cross References Rules:** Discharge of, 107 to 110.

**Cross References Forms:** Resolution to appoint or substitute another trustee, 33; notice of new or substituted trustee, 34; affidavit of new or substituted trustee, 35; application for discharge, 42; affidavit verifying application, 43; order discharging authorized trustee, 44.

**Analogous Legislation:** Canadian Act, 1875, ss. 29, 31; English Act, 1914, ss. 53(4), 77, 95; Provincial Assignments Acts, R. S. O. 1914, c. 134, s. 11; R. S. M., 1913, c. 12, s. 16.

#### ANALYSIS OF NOTES.

Method of voting on substitution of trustee.

Trustee may be removed for cause under section 15(2)—

A judicial discretion.

Several trustees.

Practice.

Vesting in the new trustee of the property of the debtor—

Registration of affidavit to have same effect as filing of conveyance.

Trustee not bound to accept or act.

Sec. 15(4).

Sec. 15(5).

Section 15(1) is in the form in which it was enacted Method of  
 by section 16 by *The Bankruptcy Act Amendment Act*, voting on  
 1921<sup>10</sup>. The method of voting in substituting a new substitution  
 trustee is not by ordinary or special resolution<sup>1</sup>. of trustee.  
 Under the English Act of 1869, the court had power to  
 restrain creditors from holding a meeting to consider  
 the removal of the trustee, until after a question as to  
 expunging the proof of the creditor had been decided<sup>2</sup>.

<sup>10</sup> The previous sub-section read:—

15. (1) A majority in number of the creditors who hold half or more in amount of the proved debts of twenty-five dollars or upwards may, at their discretion, at any meeting of creditors, substitute any other authorized trustee acting for or within the same bankruptcy district for the trustee named in the receiving order or to whom an authorized assignment has been made.

<sup>1</sup> See sections 2(z), 2(ii), 42(14). As to the right of the trustee to vote see section 42(17)(19).

<sup>2</sup> *In re Mansel ex parte Sayer* (1887), 19 Q. B. D. 679; 56 L. J. Q. B. 605.



## Section 15

In the case of an assignment of both partnership and separate assets all the creditors both partnership and separate will be allowed to vote<sup>3</sup>.

Where the debtor has made an authorized assignment to a trustee chosen by himself, a creditor who presents a bankruptcy petition may, if the court decides to make a receiving order, have the trustee named in the petition appointed as the trustee of the estate.

Trustee may  
be removed  
for cause  
under  
sec. 15(2).

While actual misconduct will be sufficient cause for the removal of the trustee, such as the payment of estate moneys to his own private account at his bank<sup>4</sup>, there may also be conduct showing that the trustee is no longer fit to remain a trustee, though his conduct may fall far short of fraud or dishonesty<sup>5</sup>. It is sufficient cause for the removal of the trustee that he has left the country in debt and gone to reside in a foreign country<sup>6</sup>; or that he is the solicitor of the bankrupt<sup>7</sup>.

A judicial  
discretion.

In making the order contemplated by section 15(2) the court is exercising a judicial discretion which if it has been exercised according to law, that is upon good cause shown, will not be interfered with<sup>8</sup>. If the facts are open to two reasonable interpretations the appeal court will trust to the discretion of the court below<sup>9</sup>.

Several  
trustees.

Section 15(2) probably authorizes the removal of one of several trustees without the removal of all<sup>10</sup>. An additional trustee may be appointed, and, it seems with limited powers, and for a limited purpose, such as the sale of the assets, pending a decision on the question of the removal of the previous trustee<sup>1</sup>. Where there are more assignees than one of a bankrupt estate,

<sup>3</sup> *Luxton v. Hamilton* (1864), 10 U. C. L. J. 334, and see as to consolidation of proceedings in such a case and the appointment of a single trustee 69(3).

<sup>4</sup> *Ex parte Townsend* (1809), 15 Ves. 470.

<sup>5</sup> *In re Mansel ex parte Newitt* (1884), 14 Q. B. D. 177; 54 L. J. Q. B. 245.

<sup>6</sup> *Gray v. Hatch* (1871), 18 Gr. 72, and see for other circumstances: *In re Morgan ex parte Wilding* (1895), 2 Mans. 526.

<sup>7</sup> *In re Dickinson* (1892), 2 B. C. R. 262. As to a case where the assignee was solicitor to the principal secured creditor, see *Orillia Export Lumber Co. v. Burson* (1903), 2 O. W. R. 1110.

<sup>8</sup> *Ex parte Sheard in re Pooley* (1880), 16 Ch. D. 107.

<sup>9</sup> *In re Mansel ex parte Newitt* (1884), 14 Q. B. D. 177; 54 L. J. Q. B. 245; *In re Dunkley ex parte Cass* (1881), 45 L. T. 560.

<sup>10</sup> *In re Mansel ex parte Newitt*, *supra*.

<sup>1</sup> *Brock v. Oline* (1906), 8 O. W. R. 144.



one of the assignees may receive moneys belonging to the estate and give a good discharge therefor<sup>2</sup>, unless his authority to complete the transaction in question has to the knowledge of the person claiming the release been challenged by his co-trustee<sup>3</sup>. A general authority from one of several assignees of an estate in bankruptcy to the others to act for him and use his name is not sufficient to enable the others to execute a release by deed. There must either be a special authority from the third assignee to execute the deed or the deed must have been executed in his presence and with his concurrence<sup>4</sup>. Section 15

As to practice in Ontario on applications to remove an assignee under Provincial Acts, see *In re Wilson*<sup>5</sup>. As to the inherent jurisdiction of courts of equity where there are no bankruptcy courts, see *Re Dickinson*<sup>6</sup>. Practice.

As to continuity of representation under the English system, see *Re Hallett & Co., Ex parte Blane*<sup>7</sup>.

Difficulties are likely to arise in the interpretation of section 15(3). Unless the words of that section which read "when a new trustee is appointed or substituted all the property and estate<sup>8</sup> of the debtor shall forthwith vest in the new trustee without any conveyance or transfer" are themselves sufficient to exclude the operation of provincial registration and land titles Acts, compliance with those Acts will be necessary for section 11(4) does not apply to the case of an appointment or substitution of a trustee under section 15. That this conclusion is correct seems to be indicated by the last sentence of section 15 (3), which provides for the registration of an affidavit of appointment<sup>9</sup>, a document which is to have the same effect as the registra- Vesting in the new trustee of the property of the debtor.

<sup>2</sup> *Smith v. Jamesons* (1793), 1 Esp. 114.

<sup>3</sup> *Bristow v. Eastman* (1793), 1 Esp. 172; see *contra Can. v. Read* (1749), 3 Atk. 695, and see *Primrose v. Bromley* (1739), 1 Atk. 89.

<sup>4</sup> *Williams v. Walsby* (1802), 4 Esp. 220.

<sup>5</sup> (1903), 6 O. L. R. 564; *In re Davis' Trust* (1896), 17 P. R. 187.

<sup>6</sup> (1892), 2 B. C. R. 262.

<sup>7</sup> (1893), 10 Mor. 250.

<sup>8</sup> Note that the word "estate" is not used in sections 6(3) or 10, or in section 11(4).

<sup>9</sup> Form 35.



## Section 15

tion or filing of a conveyance or transfer. It is considered that compliance with provincial Acts is necessary; and that until this matter is authoritatively determined, the new trustee will be well advised to register the affidavit of appointment in every office in which the interest of the debtor in real estate or immoveable property was registered or recorded, and this whether the first trustee was acting under a receiving order or under an authorized assignment. The coupling of the words "property and estate" may raise a difficulty in the case of personalty. Whether this is found to be the case or not, there is no provision for registration of any document to evidence transfer of personalty.

Registration of affidavit to have same effect as filing of conveyance.

Section 15(3) may be compared with sections 18(1) and 53(4) of the English Act. By section 18(1) when the court adjudges the debtor bankrupt, "thereupon the property of the debtor shall become divisible among his creditors and shall vest in a trustee," and by section 53(4) the certificate of the appointment of the trustee (which is given by the Board of Trade), "shall for all purposes of any law in force in any part of the British Dominions requiring registration, enrolment or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be enregistered; enrolled and recorded accordingly."<sup>10</sup>

## Sec. 15(4).

Section 15(4) directing the new trustee to pay the removed trustee his proper remuneration and disbursements will not apply to the case of a trustee *de son tort*<sup>1</sup>. Unless there are controlling circumstances, the trustee has a lien on the trust property for whatever compensation he may be entitled to<sup>2</sup>. Where the trustee parts with possession of the estate to the debtor, he will lose his lien<sup>3</sup>.

Sec. 15(5). Trustee not bound to accept or act.

Section 15(5) which has to do with the right of a trustee to refuse to accept an assignment or to act in

<sup>10</sup> See *In re Calcott & Elvins' Contract* (1898), 2 Ch. 460; 67 L. J. Ch. 553; 5 Mans. 208.

<sup>1</sup> *In re J. & H. Richards ex parte O. R.* (1884), 1 Mor. 242, and see notes to section 9.

<sup>2</sup> *In re Tilsonburg & Lake Erie & Pacific R. W. Co.* (1897), 24 O. A. R. 378 and see Rule.

<sup>3</sup> *In re Silver* (1877), 2 O. A. R. 1.



## Section 15

matters relating to assignments, receiving orders, compositions, extensions or arrangements, is in words which appear to be wide enough to apply to all trustees, though the balance of section 15 has reference only to questions relating to new trustees.

Section 15(5) says that no authorized trustee is bound to accept an authorized assignment; it says nothing about the acceptance of the estate of the debtor under a receiving order. The statute in this respect does not alter the law as it existed under certain provincial assignments Acts; for under those Acts the assignment did not become effective until assented to by the assignee<sup>4</sup>. It may be that in the case of an authorized assignment which is a voluntary act and an assignment of the whole of the debtor's property, it is not open to the trustee to accept the property in part and reject it in part<sup>5</sup>, except in so far as the Act gives express authority to the trustee so to do<sup>6</sup>. It may be that one reason for the provision that an authorized trustee is not bound to accept an authorized assignment is that a trustee who acts under an authorized assignment may be a trustee *de son tort* if a receiving order is subsequently made<sup>7</sup>.

Section 15(5) goes on to state that no authorized trustee shall be bound to act in matters relating to assignments or receiving orders or to compositions, extensions or schemes if in his opinion the realizable value of the property is not sufficient to provide the necessary disbursements and a reasonable remuneration for the trustee, unless he has been paid or tendered a sum sufficient to defray such disbursements and remuneration. A distinction thus appears to be made between accepting an authorized assignment and acting in matters relating to assignments, receiving orders and compositions. Following the usual rule in the con-

<sup>4</sup> *Bell v. Chartered Trust & Executor Co.* (1919), 46 O. L. R. 192. Under section 2(4) of *The Insolvent Act* of 1864, a voluntary assignment to an official assignee was ineffectual unless accepted by the assignee or acted upon by him: *Yarrington v. Lyon* (1866), 12 Gr. 308; *Becher v. Blackburn* (1873), 23 U. C. C. P. 207.

<sup>5</sup> *Per Duff, J., in North West Theater Co. v. MacKinnon* (1916), 52 S. C. R. 588, 599.

<sup>6</sup> See section 52.

<sup>7</sup> See notes to sections 9 and 10.



**Section 16** instruction of statutes it will perhaps be held that the clause with respect to tender has reference to the trustee acting in matters relating to assignments, etc., and not to the acceptance by the trustee of an authorized assignment<sup>8</sup>.

The landlord's claim for rent is a matter which the trustee should consider if not before he accepts, at least before he acts under an assignment<sup>9</sup>.

### Official Name.

Official  
name of  
trustee in  
bankruptcy  
or assign-  
ment  
proceedings.

16 (1) The official name of an authorized trustee acting in bankruptcy or authorized assignment proceedings shall be "The Trustee of the Property of..... a Bankrupt (or Authorized Assignor)" (inserting the name of the bankrupt or assignor), and by that name the trustee may in any part of Canada or elsewhere hold property of every description, make contracts, sue or be sued, enter into any engagement binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

In composi-  
tion or  
extension  
proceedings.

(2) The official name of an authorized trustee acting with respect to the proceedings by a debtor for a composition of, or extension of time for the payment of, his debts, or an arrangement of his affairs shall be "The Trustee acting in re the proposal of..... (insert the name of the debtor) for a composition of his debts" or "arrangement of his affairs."

**Cross References Act:** Power of trustee to bring actions, 20(1)(c), and cf. 33, 35; costs in discretion of court, 68(2); style of proceedings, 68(1); "or elsewhere" see notes to 2(dd); property defined, 2(dd); duties and powers of trustee, 17 *et seq.*

<sup>8</sup> *Ad proximum, antecedens fiat relatio nisi impediatur sententia. The Molsons Bank v. Halter* (1890), 18 S. C. R. 88.

<sup>9</sup> See *In re Auto Experts ex parte Tanner* (1921), 1 C. B. R. 418, 422 (Orde, J.).



**Cross References Rules:** Trustee not personally liable for costs in certain cases, 54(3). **Section 17**

**Analogous Legislation:** English Act, 1914, s. 76.

The trustee may sue in his own name as well as in his official name<sup>10</sup>.

### *Duties and Powers of Trustees.*

- 17 (1) The trustee shall, as soon as may be, take possession of the deeds, books and documents of the debtor and all other parts of his property capable of manual delivery. Duties and powers of trustee.
- (2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the debtor, be in the same position as if he were a receiver of the property, appointed by the court, and the court may on his application enforce such acquisition or retention accordingly. Trustee to be receiver.
- (3) The trustee shall, on the making of a receiving order or an authorized assignment, forthwith insure and keep insured in his official name until sold or disposed of, all the insurable property of the debtor, to the fair realizable value thereof or to such other insurable amount as may be approved by the inspectors or by the court, in insurance companies authorized to carry on business in the province wherein the insured property is situate. Trustee to insure property of debtor.
- (4) All insurance covering property of the debtor in force at the date of the making of such receiving order or execution of such assignment shall, immediately upon such making or executing, and without any notice to the insurer or other action on the part of the trustee, and notwithstanding any statute or rule of law or contract or provision to a Losses payable to trustee.

<sup>10</sup> *Leeming v. Murry* (1879), 13 Ch. D. 123; 48 L. J. Ch. 737; 28 W. R. 388, and see notes to section 20(1)(c), and section 25, where the English practice with respect to pending actions is summarized.



## Section 17

contrary effect, become and be, in the event of loss suffered, payable to the trustee, as fully and effectually as if the name of the trustee were written in the policy or contract of insurance as that of the insured, or as if no change of title or ownership had come about and the trustee were the insured.

**Cross References Act:** On making of R. O. trustee constituted receiver, 6(1); inspectors, 43; trustee not personally liable if not negligent for loss or damage where property of third party lost or disposed of, 22; duty of debtor to assist trustee, 54; duties and powers of trustees generally, 17 to 27; arrest of debtor about to conceal or destroy books, 53(1)(b); offence of not delivering up books, 89(c); and see 89(h) to (l); failure to keep books or mutilation of them, 91, 59(b); alternative powers of court and inspectors, 88A.

**Cross References Rules:** Application to court, 4, 14 *et seq.*; no person as against trustee entitled to withhold possession of books or set up any lien on them, 145.

**Analogous Legislation:** English Act, 1914, s. 48(1)(2).

## ANALYSIS OF NOTES.

Trustee guilty of breach of trust.

Trustee to take possession of the books of the debtor.

Trustee must elect whether to treat former trustee as trustee *de son tort*.

Trustee a receiver whose possession not to be interfered with.

Duty of trustee as officer of court to act fairly.

Section 17(4).

Section 17(3) is in the form in which it was enacted by section 17 of *The Bankruptcy Act Amendment Act, 1921*<sup>10</sup>.

A trustee who allows property to remain in the possession of the debtor which is ultimately lost to the estate may be guilty of breach of trust and liable for the value of the property and interest<sup>11</sup>.

Where other persons in addition to the bankrupt have an interest in the books the trustee is not entitled

Trustee guilty of breach of trust.

Trustee to take possession of the books of debtor.

<sup>10</sup> The previous section read:—

17. (3) Unless otherwise directed in writing by the inspectors, the trustee shall forthwith, on the making of a receiving order or execution of an authorized assignment, insure and keep insured in his official name until sold or disposed of by him all the insurable property of the debtor, to the full insurable value thereof, in insurance companies duly authorized to carry on business in the province wherein the insured property is situate.

<sup>11</sup> *Ex parte Ogle in re Pilling* (1873), L. R. 8 Ch. 711; 42 L. J. Bank. 99.



to exclusive possession; but all parties interested are entitled to inspection of them<sup>12</sup>. Documents of the bankrupt, though of a purely personal nature, pass to the trustee<sup>1</sup>. *Semble* the court has jurisdiction to direct a foreign firm to pay over to the trustee all moneys and other property which it has belonging to the bankrupt<sup>2</sup>. Section 17

In England where the trustee under a creditor's deed, on which an adjudication is made, takes possession of the debtor's property or intermeddles with it<sup>3</sup>, the trustee in bankruptcy may elect whether to treat the former trustee as his agent or a trespasser. If he elects to treat him as his agent, he is entitled to an account of the carrying on of the business, and the profit which he has made or ought to have made; if he elects to treat him as his agent, he is entitled to an account of the value at the date of taking of possession; and an account of the property which he converted since that date<sup>4</sup>, and the trustee *de son tort* will not be entitled to retain any of the assets in his hands on the ground that a sum exceeding the assets is due to him for work and labour done<sup>5</sup>. Trustee must elect whether to treat former trustee as trustee *de son tort*.

The trustee being in the position of a receiver<sup>6</sup> is not to be interfered with. Thus where a creditor under a bill of sale and the trustee have concurrent possession of the goods, the creditor may not, while the question of the validity of his security is before the court, break the concurrent possession and remove the property<sup>7</sup>. Trustee a receiver whose possession not to be interfered with.

<sup>12</sup> *In re Burnand ex parte Baker or Wilson* (1904), 2 K. B. 68; 73 L. J. K. B. 413; 11 Mans. 113.

<sup>1</sup> *In re Sherman* (1915), 1 H. B. R. 231.

<sup>2</sup> *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 380 (Bruneau, J.).

<sup>3</sup> *In re Prigoshen ex parte O. R.* (1912), 2 K. B. 494; 81 L. J. K. B. 1199; 19 Mans. 323.

<sup>4</sup> *Ex parte Vaughan in re Riddeough* (1884), 14 Q. B. D. 25; 1 Mor. 258; *In re Prigoshen ex parte O. R.*, *supra*; *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344.

<sup>5</sup> *In re J. & H. Richards ex parte O. R.* (1884), 1 Mor. 242; see notes to section 3(a), 4(10), 9, 10, 25.

<sup>6</sup> See 17(2) and 6(1). As to the powers and duties of receivers appointed by the court, see Kerr: *Law and Practice of Receivers*, Sweet & Maxwell; Halsbury: *Laws of England*, Vol. XXIV; Riviere: *The Law Relating to Receivers and Managers*, Stevens & Sons.

<sup>7</sup> *In re Fells ex parte Andrews* (1875), 4 Ch. D. 509; 46 L. J. Bank. 23.



## Section 18

Duty of trustee as officer of Court to act fairly.

In the administration of a bankrupt's estate the trustee, as an officer of the court, will be ordered to do what the court considers to be morally right and honest, even in a case in which no claim can be sustained against him at law or in equity<sup>8</sup>.

Thus the trustee being an officer of the court will be ordered to repay money paid voluntarily to him under a mistake of law if he still has the money in his hands, or subsequently obtains funds which can be used for this purpose<sup>9</sup>, but this rule does not extend to a case where there has been no act or omission on the part of the trustee, as where a person pays money on behalf of the bankrupt after notice of an available act of bankruptcy, though in ignorance of the effect of the bankruptcy law<sup>10</sup>.

## Sec. 17(4).

Section 17(4) will do away with whatever uncertainty existed as to the effect on an insurance policy of an assignment for the benefit of creditors. It was held in an Ontario case<sup>1</sup> that an assignment under the Ontario Assignments and Preferences Act of insured property, without the permission of the insurer, did not avoid the policy under the terms of the fourth statutory condition, which reads:

"If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

Powers of trustee to deal with property.

18 Subject to the provisions of this Act, an authorized trustee may do all or any of the following things:—

(a) Give receipts for any money received by

<sup>8</sup> *In re Tyler ex parte O. R.* (1907), 1 K. B. 865; 76 L. J. K. B. 541; 14 Mans. 73, and see notes to section 4(10).

<sup>9</sup> *Ex parte James in re Condon* (1874), L. R. 9 Ch. 609; 43 L. J. Bank. 107; *Ex parte Simmonds in re Carnac* (1885), 16 Q. B. D. 308; 55 L. J. Q. B. 74; *In re and ex parte Rhoades* (1899), 2 Q. B. 347; 68 L. J. Q. B. 804; 6 Mans. 277.

<sup>10</sup> *In re Hall ex parte O. R.* (1907), 1 K. B. 875; 76 L. J. K. B. 546; 14 Mans. 82, and see *In re Phillips* (1914), 2 K. B. 689; 83 L. J. K. B. 1364; 21 Mans. 144. See also notes to section 25 and Chapter VI.

<sup>1</sup> *Wade v. Rochester C. rman Fire Ins.* (1911), 23 O. L. R. 635.



him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof; Section 18

(b) Prove, rank, claim and draw a dividend in respect of any debt due to the debtor;

(c) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of this Act.

(d) An authorized trustee may at any time apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt, an authorized assignor or a debtor who has made a proposal for a composition, extension or scheme of arrangement. The court shall give in writing such directions, if any, as may be proper according to the circumstances and not inconsistent with this Act, which directions shall bind, as well as justify the subsequent consonant action of, the trustee. Trustee may apply to court for directions.

**Analogous Legislation:** English Act, 1914. s. 55(2) (3) (4); 79(3).

Section 18(d) was first enacted by *The Bankruptcy Act Amendment Act, 1921*.

Trustees applying to prove are not bound by the same *laches* as might bind an individual creditor<sup>2</sup>.

*Semble*, the creditor must join with the trustee in the affidavit in proof of the debt where an affidavit is required.<sup>3</sup>

It should not be assumed that section 18(d) will authorize a trustee to apply to the court for directions in simple matters of administration where there is no doubt as to the power of the trustee. The trustee and the inspectors are the administrators of the estate, not the court. See sections 17, 20, 43, 88A.

<sup>2</sup> *Ex parte Smith in re Marsh* (1832), 1 D. & C. 267.

<sup>3</sup> *In re Amner ex parte Robson* (1841), 2 M. D. & D. 65.



**Section 19**

Trustee to  
have right  
to sell  
patented  
articles.

19 (1) Where any property of the debtor vesting in an authorized trustee consists of patented articles or goods which were sold to the debtor subject to any restrictions or limitations, the trustee shall not be bound by any such restrictions or limitations but may sell and dispose of any such patented articles, or goods as hereinbefore provided, free and clear of any such restrictions or limitations.

Right of  
manufac-  
turer.

(2) If the manufacturer or vendor of any such patented articles or goods objects to the disposition of them by the trustee as aforesaid and gives to the trustee notice in writing of such objection within five days after the date of the receiving order or authorized assignment, such manufacturer or vendor shall have the right to purchase such patented articles or goods at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

Copyright.

(3) Where the property of a bankrupt or authorized assignor comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorize the sale of, any copies of the work, or to perform or authorize the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt or authorized assignor, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by license, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not



less than that which the bankrupt or authorized assignor was liable to pay. Section 20

**Cross References Act:** Property defined, 2(*dd*) ; property vesting in trustee, 6(3), 10, 25 ; power of trustee to sell, 20(1) (*a*).

**Analogous Legislation:** To section 19(3) ; English Act, 1914, s. 60.

See *In re Richards, Ex p. Deeping*, which was previous to the passing of the corresponding English section<sup>4</sup>.

- 
- 20 (1) The trustee may, with the permission Powers exercisable by trustee with permission of inspectors. in writing of the inspectors, do all or any of the following things:—
- (*a*) Sell all or any part of the property of the debtor (including the goodwill of the business, if any, and the book debts due or growing due to the debtor), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;
  - (*b*) Carry on the business of the debtor, so far as may be necessary for the beneficial winding-up of the same ;
  - (*c*) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor ;
  - (*d*) Employ a solicitor or other agent to take any proceedings or do any business, which may be sanctioned by the inspectors ;
  - (*e*) Accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time subject to such stipulations as to security and otherwise as the inspectors think fit ;
  - (*f*) Mortgage or pledge any part of the property of the debtor for the purpose of raising money for the payment of his debts ;

<sup>4</sup> (1907), 2 K. B. 33 ; 76 L. J. K. B. 643 ; 14 Mans. 88, and *cf. Barker v. Stickney* (1919), 1 K. B. 121.



# Section 20

- (g) Refer any dispute to arbitration, compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the debtor and any person who may have incurred any liability to the debtor, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on;
- (h) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable against the estate;
- (i) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the debtor, made or capable of being made on the trustee by any person or by the trustee on any person;
- (j) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.
- (k) Elect to retain for the whole or part of its unexpired term, or to assign or disclaim, the whole pursuant to this Act, any lease of, or other temporary interest in any property forming part of the estate of the debtor.

Trustee with permission of inspectors may retain or disclaim leases.

Permission limited to particular thing or class.

- (2) The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things but shall only be a permission to do the particular thing or things or class of thing or things which the written permission specifies.



- (3) (a) All sales of property made by the trustee shall vest in the purchaser all the legal and equitable estate of the debtor therein; Section 20  
Effect of  
sales of prop-  
erty by  
trustee.
- (b) in the province of Quebec, if the sale has been made at public auction at the place prescribed and after advertisement as required for the sale of immoveable property by sheriff, in the district or place where such immoveable property is situate, the sale made by the trustee shall have the same effect as to mortgages, hypothecs, privileges or other real rights then existing thereon as if the same had been made by the sheriff in the said province under a writ of execution issued in the ordinary course, and the title conveyed by such sale in the said province shall have equal validity with a title created by sheriff's sale, and the conveyance of the trustee shall have the same effect as a sheriff's deed in the said province. Such sale shall be subject to the contribution to the building and jury fund provided for in the case of sheriff's sales. In case of false bidding the same recourse as in case of sheriff's sale may be exercised against the false bidder in the manner prescribed by General Rules. Sales in  
Province of  
Quebec.

**Cross References Act:** Inspectors, 43, 84(2); power of trustee to sue in official name, 16(1); power of trustee to recover proceeds, 33; right of creditor in some cases to sue, 35, cf. 6(1), 7; no action against trustee for dividend, 37(9); trustee not personally liable if not negligent for loss or damage where property of third party seized or disposed of, 22; fees and expenses of trustee, 51(1); costs of administration, 51(2); tariff of costs and fees for attorneys, solicitors and counsel, 67; employment of debtor to carry on his trade or administer property, 21; allowance to debtor, 21; property defined, 2(*dd*); property vesting in trustee, 6(3), 25, 10; property vesting in new trustee, 15(3); disallowance of claims, 53; carrying on business, 27, 13(3); disclaimer, 52.

**Cross References Rules:** Costs, 54 to 61; fees, 62.

**Analogous Legislation:** English Act, 1914, ss. 55(1), 56; Canadian Act, 1875, ss. 38, 39, 43; see R. S. Q., 1909, arts. 7552 to 7557; Provincial Assignments Acts, R. S. O. 1914, c. 134, s. 12(1);



**Section 20** Winding-up Act, R. S. C. 1906, c. 144, s. 34; The Companies Act (1862), 25 & 26 Vic. c. 89, s. 98 (Imp.); The Companies (Consolidation) Act (1908), 8 Ed. VII., c. 69, s. 151 (Imp.).

## ANALYSIS OF NOTES.

Permission in writing of the inspectors.

Sale under section 20(1) (a)—

Persons who may not purchase:

Inspector.

Trustee.

Solicitor of debtor.

Solicitor of trustee.

Auctioneer.

Encumbrancers.

Relief when sale attacked.

Effect of sale of good will.

Book debts due or growing due.

Good title.

Sale by auction.

Sale by private contract.

Property of the debtor.

Contract too indefinite.

Applications to stop sale.

Carrying on the business under section 20(1) (b).

Carrying on legal proceedings under 20(1) (c)—

Costs.

Security for costs.

Absence of permission of inspectors no defence.

Effect of trustee electing not to proceed.

Extent to which trustee represents creditors.

Proceedings to be taken only for benefit of estate in general.

Rights of action passing to the trustee.

Power to employ solicitor or other agent under section 20(1) (d)—

Inspectors may limit amount of costs to be incurred.

Absence of permission of inspector no defence to action.

Bringing in bills for taxation.

Trustee personally liable to solicitor for his costs.

Solicitor's lien.

Application by solicitor for payment.

Court exercises jurisdiction over solicitor.

Bankrupt may not usually intervene.

Compromise under section 20(1) (g) (h) (i).

Duty of trustee not of court to settle terms of compromise.

Trustee may apply for approval of compromise.

Bankrupt usually has no *locus standi*.

Effect of absence of permission of inspectors.

Compromise of contingent claims.

Disclaimer under section 20(1) (k).

Section 20(2). Permission must not be a general permission.

Section 20(3) (a). Sales of property by the trustee.

Section 20(3) (b).

Section 20(1) (k) was first enacted by section 19 of *The Bankruptcy Act Amendment Act, 1921*. Section 20(2) is as it was enacted by section 20 of *The Bankruptcy Act Amendment Act, 1921*<sup>5</sup>.

<sup>5</sup> The previous section read:—

20(2). The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things.



Section 20(1) requires the permission in writing of the inspectors as authorization for the trustee to do the things set out in the section. Under the English Act permission in writing is not required. The authorization may be signed by the inspectors separately; no meeting is required<sup>6</sup>. The permission in question is required for the protection of the estate, and is not a condition precedent to the effective execution of the powers conferred on the trustee; its absence therefore cannot be set up by a defendant as an answer to proceedings by the trustee<sup>7</sup>.

Section 20  
Permission  
in writing  
of the  
inspectors.

*Seem* the creditors cannot override the directions given by the inspectors<sup>8</sup>; but if aggrieved by any act or decision of the trustee they may apply to the court under section 39; section 79(1) of the English Act has been omitted from the Canadian Act. The position of the inspectors is therefore stronger under the Canadian Act<sup>9</sup>.

Section 20(1)(a) must be read with section 20(3).

Under the English Act, the trustee does not require the permission of the inspectors to sell<sup>10</sup>.

Sale under  
Sec. 20(1)(a)

The consent of the inspectors to a transfer is not required where a creditor proceeding under section 35 has had a previous conveyance set aside and acquires a right to have the property conveyed to him<sup>11</sup>.

It has in effect been held in Quebec that the court, before the appointment of inspectors,<sup>12</sup> can give the trustee the permission to act which the inspectors may give under section 20. Thus the court has authorized

but shall only be a permission to do any particular thing or things for which permission is sought in the specified case or cases.

<sup>6</sup> *Ex parte White in re Gearing* (1881), 29 W. R. 632.

<sup>7</sup> *In re Branson ex parte Trustee* (1914), 2 K. B. 701; 83 L. J. K. B. 1310; 21 Mans. 160, and see *Cyclemakers Co. v. Sims* (1903), 1 K. B. 477.

<sup>8</sup> *In re Geiger* (1915), 1 K. B. 439; *In re Salmon ex parte O. R.* (1916), 2 K. B. 510. Contrast *In re Consolidated Diesel Engine Mfgs.* (1915), 1 Ch. 192. The effect of section 88A has yet to be determined.

<sup>9</sup> But the trustee, if the creditors are decidedly against a proposed course of action, may be well advised to apply to the court for approval: See *Ex parte Hurlbatt in re Ridgeway* (1890), 61 L. T. 647; 6 Mor. 277.

<sup>10</sup> Section 55.

<sup>11</sup> *Donovan v. Herbert* (1885), 12 O. A. R. 298, affd. in S. C. C. Coutlee S. C. Dig. (1875-1903) 1434.

<sup>12</sup> See section 88A.



**Section 20** the trustee to sell part of the property of the bankrupt to provide funds for necessary expenses<sup>13</sup>; and the court has likewise authorized the trustee to contest an action in a foreign court<sup>14</sup>.

Section 20(1)(a) must not be used as a means by which directors and shareholders of an insolvent company, having divested themselves of liability, can repossess the property at a dictated price<sup>15</sup>.

Persons who  
may not  
purchase.

Inspector.

Trustee.

Persons in a fiduciary relation to the general body of creditors are disabled (under the ordinary rules of equity) from becoming purchasers of any part of the estate or making any other arrangement with the trustee for their own benefit except upon making full disclosure of all material facts within their knowledge, giving full credit for the value of their bargain, and obtaining the consent of the creditors<sup>1</sup>. An inspector is in such a fiduciary relation<sup>2</sup>. Time runs under the statute of limitations in his favour from the date of purchase<sup>3</sup>. On the same principle, a trustee may not purchase the estate<sup>4</sup>, or, it seems the debt or dividend of a creditor<sup>5</sup>. If he purchases any part of the estate without the authority of the court he does so at his peril<sup>6</sup>, and confirmation will not be given after a purchase made without leave<sup>7</sup>. The court may give the

<sup>13</sup> *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 381 (Bruneau, J.); and see *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 383 (Bruneau, J.).

<sup>14</sup> *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 383 (Surveyer, J.); and see as to handing over property in the possession of the bankrupt, *In re Thornton, Davidson & Co., Macdonald's Claim* (1921), 1 C. B. R. 380 (Bruneau, J.).

<sup>15</sup> *Imperial Bank of Canada v. Barber* (1921), 1 C. B. R. 485; 20 O. W. N. 282 (Middleton, J.).

<sup>1</sup> *Taylor v. Davies* (1920), A. C. 636, 647.

<sup>2</sup> *S. C. and Gastonguay v. Savoie* (1899), 29 S. C. R. 613; *In re Canada Woollen Mills (Long's Appeal)* (1905), 9 O. L. R. 367; *Segsworth v. Anderson* (1895), 24 S. C. R. 699; though *semble* his partner purchasing on his own account is not, *Ex parte and in re Gallard* (1897), 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52.

<sup>3</sup> *Taylor v. Davies* (1920), A. C. 636. Cf. *Ex parte and in re Gallard* (1897), 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52.

<sup>4</sup> *Morrison v. Watts* (1892), 19 O. A. R. 622; *Ex parte Lacey* (1802), 6 Ves. 625; *Ex parte Bennett* (1805), 10 Ves. 381; *Kitson v. Hardwick* (1872), L. R. 7. C. P. 473, 478. But see section 27(d).

<sup>5</sup> *Pooley v. Quilter* (1858), 2 DeG. and J. 327, 350; 27 L. J. Ch. 374.

<sup>6</sup> *Ex parte Lewis in re Leonard* (1819), 1 Gl. & J. 69.

<sup>7</sup> *In re Knowles ex parte Thwaites* (1834), 1 M. & A. 323, q. v. for list of previous cases.



trustee leave to bid or purchase, but only under very special circumstances. Such consent will not be given merely because at a meeting of creditors not attended by all, permission was given to the trustee to bid<sup>8</sup>. There must possibly be "universal consent"<sup>9</sup>. Whether "universal consent" is necessary or not, it is clear that the court will take great care before giving its consent, to see that the parties are put at arm's length, and that they take the character of purchaser and vendor<sup>10</sup>. This careful examination before permission is given is the more necessary because after permission is given to bid the fiduciary relationship is past<sup>1</sup>. If a trustee is minded to become the purchaser of the estate he can ask to be discharged from his office of trustee, and when discharged he may be competent to become a purchaser<sup>2</sup>, but the mere form of resigning will not necessarily shake off the obligation which has attached to him as trustee<sup>3</sup>. Nor may a trustee sell to his partner or to anyone else in such a way that the trustee may derive any benefit therefrom<sup>4</sup>; though it may be that he can sell to his partner where the partner is buying for himself and not for the benefit of the partnership<sup>5</sup>. It has however been held that when the proposed sale is clearly to the benefit of the general body of creditors, the court may sanction the sale of the property of the bankrupt to a company promoted by the trustee and the inspectors, in which they are shareholders<sup>6</sup>. A person who is solicitor to the debtor before his bankruptcy and as such acquires informa-

Section 20

Solicitor of debtor.

<sup>8</sup> *Ex parte Beaumont in re Edmontson* (1834), 1 M. & A. 304; *Morrison v. Watts* (1892), 19 O. A. R. 622; *Ex parte Molineux* (1835), 4 Dea. & C. 460.

<sup>9</sup> *Ex parte Lacey* (1802), 6 Ves. 625; *Ex parte James* (1803), 8 Ves. 337. Under the Ontario Act inspectors could not give a trustee permission to purchase: *Morrison v. Watts* (1892), 19 O. A. R. 622.

<sup>10</sup> *Gibson v. Jeyes*, 2 Ves. 266, 277; *Morrison v. Watts*, *supra*.

<sup>1</sup> *Roswell v. Coaks*, 23 Ch. D. 302; 52 L. J. Ch. 465.

<sup>2</sup> *In re and ex parte Wainwright* (1881), 19 Ch. D. 140, 147; 51 L. J. Ch. 67; *Ex parte Molineux* (1835), 4 Dea. & C. 460.

<sup>3</sup> *Morrison v. Watts* (1892), 19 O. A. R. 622; *Ex parte Lacey* (1802), 6 Ves. 625.

<sup>4</sup> *In re and ex parte Moore* (1882), 51 L. J. Ch. 72; 45 L. T. 558.

<sup>5</sup> *Ex parte and in re Gallard* (1897), 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52.

<sup>6</sup> *Ex parte Slater in re Spink* (1913), 108 L. T. 572.



- Section 20** tion as to the value of property of the debtor, may not after bankruptcy avail himself of this information to purchase from the trustee the property of the bankrupt at an advantage<sup>7</sup>. The solicitor to the commission was never allowed to purchase, except where, being a mortgagee, he was first displaced and another solicitor appointed to the commission<sup>8</sup>. The rule even extended so far that the solicitor might not purchase for another<sup>9</sup>. As the auctioneer bears a fiduciary character with reference to the estate he too is precluded from becoming a purchaser by the general policy of the law which prohibits an agent from selling to himself<sup>10</sup>, but there is no such rule to prevent a sale to the bankrupt<sup>1</sup> or to his partners<sup>2</sup>.
- Solicitor of trustee.**
- Auctioneer.**
- Incumbrancers.** The court will give leave to mortgagees to bid<sup>3</sup>, and in such case the court may permit the costs of the application for leave to bid to be paid out of the proceeds of the sale<sup>4</sup>. Whether when a trust estate has been directed to be sold the trustee who is also an incumbrancer shall be at liberty to bid is a matter resting in the sound discretion of the court. Usually leave will not be given until some attempt has been made to sell and proved to be abortive<sup>5</sup>.
- Relief when sale attacked.** Where a purchase made by one in a fiduciary capacity is attacked, there may be a finding that the property remains subject to the trust; and to have an account taken on that footing; or a resale may be ordered, the plaintiffs taking the increased price realized, and holding the defendants to the purchase if no more is realized<sup>6</sup>. Where the consent of an opposing
- <sup>7</sup> *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; 55 L. J. Ch. 884.  
<sup>8</sup> *Ex parte Farley in re Delves* (1833), 3 Dea. & C. 110; *In re Brown ex parte Towne* (1834), 4 Dea. & C. 519; *Ex parte James* (1803), 8 Ves. 337.  
<sup>9</sup> *Ex parte Bennett* (1805), 10 Ves. 381.  
<sup>10</sup> *Kitson v. Hardwick* (1872), L. R. 7 C. P. 473, 478.  
<sup>1</sup> *Kitson v. Hardwick*, *supra*.  
<sup>2</sup> *In re Motion* (1873), L. R. 9 Ch. 192; 43 L. J. Bank. 59.  
<sup>3</sup> *Ex parte Hammond* (1820), 1 Buck 464; *Ex parte Du Cane* (1816), 1 Buck 18.  
<sup>4</sup> *Ex parte Say in re Thornton* (1832), 1 D. & C. 32.  
<sup>5</sup> *Hutton v. Justin* (1901), 22 C. L. T. Occ. N. 23, *affd.* (1902), 1 O. W. R. 64; *Tennant v. Trenchard* (1869), L. R. 4 Ch. 537; 38 L. J. Ch. 661.  
<sup>6</sup> *Atkinson v. Casserley* (1910), 22 O. L. R. 527; *Ex parte Lewis in re Leonard* (1819), 1 Gl. & J. 69.



creditor to a sale of the property of the debtor is obtained by a secret arrangement that the opposing creditor shall obtain a larger dividend than the other creditors; and a note of a third party is given to the creditors to secure to him the amount promised, the arrangement cannot stand, and no action can be maintained upon the note<sup>7</sup>. Section 20

An assignment of a business and goodwill under this section confers on the assignee the exclusive right to carry on the business assigned, and to represent himself as carrying on that business. But the rights of a purchaser of the goodwill of a business from the trustee do not extend to restrain the bankrupt (even if he joins in the conveyance) from *bona fide* commencing a fresh business and from seeking assistance in it from his old friends and customers; for the alienation of his business and goodwill is involuntary<sup>8</sup>. Effect of sale of goodwill.

The expression "book debts" is not confined to debts entered in a book, but includes all such debts connected with his trade as are due the trader and would in the ordinary course of business be entered in books<sup>9</sup>. Book debts due or growing due.

The trustee, unless he contracts that he is selling only such title as he may have, is bound to make a good title<sup>10</sup>. Good title.

Where a sale takes place by auction the trustee should employ a properly licensed auctioneer if any municipal by-law exists prohibiting persons from acting as auctioneers unless duly licensed<sup>1</sup>. Sale by auction.

<sup>7</sup> *Brigham v. Banque Jacques Cartier* (1900), 30 S. C. R. 429.

<sup>8</sup> *Walker v. Mottram* (1881), 19 Ch. D. 355; 51 L. J. Ch. 108; *Green v. Morris* (1914), 1 Ch. 562; 83 L. J. Ch. 559.

<sup>9</sup> *Shipleigh v. Marshall* (1863), 32 L. J. C. P. 258; 14 C. B. N. S. 566; but see as to book debts of a solicitor *Ex parte Roberts in re Holden* (1864), 10 Jur. N. S. 28.

<sup>10</sup> *White v. Foljambe* (1805), 11 Ves. 337; *McDonald v. Hanson* (1806), 12 Ves. 277. It was held in *Johnston v. Barker* (1869), 20 U. C. C. P. 228, that where a person who had been appointed by the proper authority under the Act of 1864 as official assignee for a county in which he was a non-resident, sold goods of the insolvent in the honest belief that he had a right to sell them, knowledge on the vendee's part of the possible defect in the assignee's title did not protect him from liability if he had warranted his title. And see section 14(2).

<sup>1</sup> *Regina v. Rawson* (1892), 22 O. R. 467.



## Section 20

Sale by  
private  
contract.

Property of  
the debtor.

A sale may be by private contract without permission of the court<sup>2</sup>.

The property of the debtor divisible among his creditors is defined in section 25<sup>3</sup>. The right to sue under a contract such as a contract of indemnity may be property which can be assigned by the trustee<sup>4</sup>. The purchaser from a trustee of the property affected has the right to continue an action commenced by the trustee to have it declared that a deed made by the debtor purporting to be a conveyance absolute was a mortgage<sup>5</sup>. Share certificates pledged with a firm which afterwards becomes bankrupt may be ordered to be sold after advertisement if the pledgor cannot be found<sup>6</sup>.

Contract too  
indefinite.

A sale at a price which will be equal to twenty-five cents on the dollar of such of the claims of the creditors "as may be admitted or adjudicated" is too indefinite to be enforced<sup>7</sup>.

Applications  
to stop sale.

As to applications to the court to stop a sale, see *re Atkinson*<sup>8</sup>; *ex parte Montgomery*<sup>9</sup>; *Imperial Bank of Canada v. Barber*<sup>10</sup>; *in re Lemieux and Capping Motor Distributors, Ltd.*<sup>11</sup>; *in re Montreal Bargain & Jobbing House*<sup>12</sup>.

<sup>2</sup> See previously as to sale by private contract, *Ex parte Goding in re Morris* (1832), 1 D. & C. 323; *In re Motion* (1873), L. R. 9 Ch. 192; 43 L. J. Bank. 59.

<sup>3</sup> See definition of property, section 2(dd).

<sup>4</sup> *In re Perkins, Poyser v. Beyfus* (1898), 2 Ch. 182; 67 L. J. Ch. 454; 3 Mans. 193; *British Union v. Rawson* (1916), 2 Ch. 476; *Seear v. Lawson* (1880), 15 Ch. D. 426; 49 L. J. Bank. 69; *Guy v. Churchill* (1888), 40 Ch. D. 481; 58 L. J. Ch. 345; see also notes to sections 17, 25, 20(3) (a); *Bertram v. Pendry* (1877), 27 U. C. C. P. 371.

<sup>5</sup> *Seear v. Lawson, supra*, and see notes to section 20(3) (a). A person who has purchased from the trustee all the assets will not, without special circumstances, be entitled to the removal of a stay of proceedings in an action which the trustee had not continued: *Selig v. Lion* (1891), 1 Q. B. 513; and see *In re Arnold ex parte O. R.* (1891), 9 Mor. 1.

<sup>6</sup> *In re Harrison & Ingram ex parte Whinney* (1906), 14 Mans. 132.

<sup>7</sup> *In re Bolt and Iron Co.* (1885), 10 P. R. 437.

<sup>8</sup> (1840), 1 M. D. & D. 238, an application by a bankrupt; and see *In re and ex parte Wainwright* (1881), 19 Ch. D. 140; 51 L. J. Ch. 67; *Kitson v. Hardwick* (1872), L. R. 7 C. P. 473.

<sup>9</sup> (1822), 1 Gl. & J. 338. Application by certain creditors; cf. *O'Reilly v. Rose* (1871), 18 Gr. 33; cf. *In re and ex parte Gallard* (1897), 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52, and Rule 14.

<sup>10</sup> (1921), 1 C. B. R. 485; 20 O. W. N. 282 (Middleton, J.), an action by a creditor, which was treated as an application under section 39.

<sup>11</sup> (1921), 1 C. B. R. 464 (Panneton, J.), an application by a conditional vendor. Duty of trustee to stop sale. Costs.

<sup>12</sup> (1921), 1 C. B. R. 437. Goods of third parties.



The court has jurisdiction at the instance of an interim receiver to restrain an authorized trustee, who has been appointed trustee on the petition of another creditor, from proceeding with the sale of the property<sup>13</sup>.

Sections 20(1)(a) and (e) can be read together and confer wide powers. There should therefore in the usual case be no need to apply to the court for an order confirming the terms of the sale<sup>14</sup>.

The power conferred by section 20(1)(b) is a limited one. The business may be carried on only for the purpose of its beneficial winding up; it may not be carried on with the view of making profit by it as a going concern<sup>1</sup>, or with a view to its resuscitation or continuance<sup>2</sup>. But there is power under this section<sup>3</sup> to carry on the business in order that a sale may be made of a going concern in a good state for sale<sup>4</sup>; and with a view to the sale of the business as a going concern, the trustee may carry on the business not merely by completing contracts already entered into<sup>5</sup>, but also

<sup>13</sup> *In re Bonneville v. Hollander* (1921), 1 C. B. R. 378 (Panneton, J.).

<sup>14</sup> It is submitted that section 18(d) is hardly intended to authorize such a practice. Such applications have, however, been made: *In re Bastien* (1921), 1 C. B. R. 457; *In re St. Denis Coal and Cartage Co., Ltd.* (1921), 1 C. B. R. 469.

<sup>1</sup> *Ex parte Emmanuel in re Batey* (1881), 17 Ch. D. 35; 50 L. J. Ch. 305.

<sup>2</sup> *In re Wreck Recovery and Salvage Co.* (1880), L. R. 15 Ch. D. 353; 56 L. J. Q. B. 291. Contrast the powers given under section 13. *Semble*, neither the inspectors nor a majority of the creditors can, against the wishes of a dissenting creditor, give the trustee any greater power than this section confers: *Ex parte Emmanuel in re Batey, supra*. Nor can the Court extend the power of the trustee: *Ex parte Emmanuel in re Batey, supra*; cf. *Ex parte Miller* (1840), 1 M. D. & D. 39; *In re Wreck Recovery and Salvage Co., Ltd., supra*.

<sup>3</sup> As there would be under a deed assigning an estate to trustees on trust to sell for the benefit of creditors: *Quebec Bank v. Snure* (1869), 16 Gr. 681.

<sup>4</sup> See *In re Wreck Recovery & Salvage Co.* (1880), L. R. 15 Ch. D. 353; 56 L. J. Q. B. 291. Formerly a creditor might insist on a sale though the other course was more advantageous: *Ex parte Goring* (1790), 1 Ves. 169; *Ex parte Lyon in re Dumbell* (1802), 6 Ves. 617, 622; but see *Ex parte Hall in re Sutton* (1838), 2 Dea 263. See as to whether the Court will restrain a proposed sale: *In re Walsh* (1859), 9 Tr. Ch. 16; *Ex parte Montgomery* (1822), 1 Gl. & J. 338; *In re Atkinson* (1840), 1 M. D. & D. 238.

<sup>5</sup> See *British Wagon Co. v. Lea & Co.* (1880), 5 Q. B. D. 149.



Section 20 by entering into new contracts<sup>6</sup>. But the trustee may not increase the liabilities by making fresh contracts bearing a higher rate of interest<sup>7</sup> or materially reduce the company's assets by parting with the company's right of retainer<sup>8</sup>.

It has been held in Quebec under *The Winding-Up Act* that where the liquidators of a construction company have been authorized by the court to complete a construction contract for the benefit of the estate, and, in the work of completion, adopt the prior contract between the company and a sub-contractor for part of the work, the sub-contractor will be entitled to be paid in full for work done after the liquidation, but will rank as a creditor for work done prior thereto<sup>9</sup>.

It has been held by Pollock, B., that where a contract has been entered into after liquidation proceedings have commenced, it is no defence to an action on the contract by the liquidator that the contract was not required for the beneficial winding-up of the business<sup>10</sup>. Whether this case will be followed or not is perhaps open to question; but it is established that the onus of proof in such a defence rests on the defendant, at least where the contract itself is colourless and does not show that it was not made for the purpose of beneficial winding-up<sup>1</sup>.

<sup>6</sup> *Hire Purchase Co., Ltd. v. Richens* (1887), 20 Q. B. D. 387. As to the limits to the power of the trustee to enter into new contracts or to carry on the business with a view to its being sold as a going concern, see *per Jessel, M.R., In re Wreck Recovery & Salvage Co.* (1880), L. R. 15 Ch. D. 353; 56 L. J. Q. B. 291. "Necessary" means highly expedient under all the circumstances of the case for the beneficial winding up of the company. *Per Thesiger, L.J., in S. C.*

<sup>7</sup> *In re East of England Banking Co.* (1868), L. R. 4 Ch. 14, 17.

<sup>8</sup> *Williams v. Dominion Trust Co.* (1916), 31 D. L. R. 786; 35 W. L. R. 664. Authority for such action must be found in one of the other sections of the Act.

<sup>9</sup> *In re Bishop Construction Co., Ltd., Hains v. Garth* (1914), 15 D. L. R. 911.

<sup>10</sup> *Bateman & Co. v. Ball* (1887), 56 L. J. Q. B. 291.

<sup>1</sup> *Hire Purchase Co., Ltd. v. Richens* (1887), 20 Q. B. D. 387. The trustee is entitled to payment in full for goods supplied after winding-up, whether or not the contract was entered into before that date: *In re Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q. B. D. 179; as to the funds out of which the costs of carrying on the business are to be paid, see *In re Asphaltic Wood Pavement Co., Lee & Chapman's Case* (1885), 30 Ch. D. 216; *In re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *In re Regent's Canal Iron Works Co. ex parte Grissel* (1878), 3 Ch. D. 411.



See as to the appointment of receivers and managers for the winding-up of a company with assets beyond the jurisdiction: *In re Steel Co. of Canada*<sup>2</sup>. Section 20

Where the debtor has continued to carry on his business without the consent of the inspectors, the court has restrained him from so doing on the petition of a creditor<sup>3</sup>.

It is important before continuing litigation already commenced by or against the debtor or before initiating proceedings that the trustee should understand his position with regard to costs. Subject to the provisions of Rule 54(3) the trustee is personally liable for costs whether he sues or is sued<sup>4</sup> in his own name or in his official name<sup>5</sup>, thus differing from a liquidator<sup>6</sup>, for the trustee cannot charge the creditors personally with the costs unless upon a direct or implied promise of indemnity<sup>1</sup>. But a trustee who has not been guilty of misconduct is entitled to full indemnity out of the trust estate against costs, charges and expenses not improperly incurred even in the case of unsuccessful litigation<sup>2</sup>, though if the trustee appeals and is unsuccessful he may be ordered personally to pay the costs<sup>3</sup>. The trustee will be allowed his costs out of the estate where the question is new and a proper one for him to raise in the interest of the general creditors<sup>4</sup>. Not-

<sup>2</sup> (1885), W. N. 79.

<sup>3</sup> *In re Montreal Co-operative Bakery* (1921), 1 C. B. R. 377 (Bruneau, J.).

<sup>4</sup> *Buchanan v. Smith* (1871), 18 Gn. 41; where a trustee of his own free will makes himself a party to an action outside the Court of Bankruptcy there is jurisdiction to make an order on him for the costs: *School Board for London v. Wall Bros.* (1891), 8 Mor. 202.

<sup>5</sup> *Macdonald v. Balfour* (1898), 20 O. A. R. 404; *Smith v. Williamson* (1889), 13 P. R. 126; *In re and ex parte Angerstein* (1874), L. R. 9 Ch. 479; 43 L. J. Bank. 131; *Ex parte Jenkins In re Glanville* (1885), 2 Mor. 71; 33 W. R. 523; *Cole v. British Columbia Fur & Trading Co.* (1918), 42 O. L. R. 587.

<sup>6</sup> *Fraser v. Province of Brescia Steam Tramways* (1887), 56 L. T. 771.

<sup>1</sup> *Johnston v. Dulmage* (1899), 30 O. R. 233.

<sup>2</sup> *Pitts v. Lafontaine* (1881), 6 A. C. 482; 50 L. J. P. C. 8; *Smith v. Beal* (1894), 25 O. R. 377; *Ex parte Goatly in re Jones* (1911), 56 Sol. J. 17; *Ex parte Gordon in re Bryant* (1889), 6 Mor. 262; *Ex parte Joyner*, 2 M. & A. 1.

<sup>3</sup> *Tucker v. Hernaman* (1853), 4 DeG. M. & G. 395; *In re Butterworth ex parte Russell* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; *Smith v. Beal* (1894), 25 O. R. 368.

<sup>4</sup> *Yale v. Tollerton* (1866), 2 Ch. Ch. 49.



## Section 20

withstanding Rule 54(3), it is considered that a trustee who wishes to make an application to the court the success of which is doubtful, should, before making it, get from the creditors an indemnity against the costs, if he knows there are no assets out of which they can be paid, for if the estate is insufficient he may have to bear them personally<sup>5</sup>. The rule hitherto has been that a trustee is not bound to go on with litigation unless he is satisfied that he has assets sufficient for the purpose<sup>6</sup>. Where the trustee enters no appearance to an action against the debtor, costs will not be given against the trustee personally<sup>7</sup>. It has been held that if the trustee elects to defend an action to which the bankrupt is a party he cannot adopt part of the action and leave out the rest and will be ordered to pay the costs occasioned by such an attempt<sup>8</sup>. The fact that a liquidator who sues in his own name has previously obtained leave to sue will not relieve him of his personal liability for costs; though it may give him a right to be recouped out of the estate if there are assets<sup>9</sup>.

## Security for costs.

A trustee in bankruptcy, at least where suing in his official name<sup>10</sup>, and where he has not been deliberately selected for the purpose of depriving the defendants whom he was about to sue of their power to get costs should they prove successful<sup>11</sup>, will not be ordered to give security for costs even when insolvent<sup>1</sup>.

<sup>5</sup> *In re and ex parte Angerstein* (1874), L. R. 9 Ch. 479; 43 L. J. Bank. 479.

<sup>6</sup> *Fraser v. Province of Brescia Steam Tramways* (1887), 56 L. T. 771.

<sup>7</sup> *Dansk Rekyllrifel Syndikat Aktieselskab v. Snell* (1908), 2 Ch. 127; 77 L. J. Ch. 352; 15 Mans. 134. It was held under the Ontario Assignments and Preferences Act that an assignee might be justified in disputing the claim of a plaintiff, but that would not necessarily disentitle the plaintiffs to costs: *Zimmerman v. Sproat* (1912), 26 O. L. R. 448; *McLarty v. Todd* (1912), 4 O. W. N. 172.

<sup>8</sup> *Borneman v. Wilson* (1884), 28 Ch. D. 53; 54 L. J. Ch. 631.

<sup>9</sup> *Jackson v. Cannon* (1902), 10 B. C. R. 73.

<sup>10</sup> *Pooley v. Whetham* (1885), 28 Ch. D. 38; 54 L. J. Ch. 162.

<sup>11</sup> *Greener v. Kahn* (1906), 2 K. B. 374, as explained in *White v. Butt* (1909), 1 K. B. 50; 78 L. J. K. B. 65; and *Rainbow v. Kittle* (1916), 1 Ch. 313.

<sup>1</sup> *Cowell v. Taylor* (1885), 31 Ch. D. 34; 55 L. J. Ch. 92; *Vars v. Gould* (1879), 8 P. R. 31; *Major v. MacKenzie* (1895), 17 P. R. 18. See as to a case where a creditor is suing under section 35 notes to that section.



Where the trustee brings action without having first obtained the permission of the inspectors, this fact cannot be set up as a matter of defence, for the provision is for the protection of the estate on matters relating to costs, charges and expenses<sup>2</sup>.

Section 20  
Absence of  
permission  
of inspectors  
no defence.

Where the trustee has the permission of the inspectors to proceed with an action pending at the time of the assignment no application need be made in Ontario for leave to continue the action. The *chose in action* having vested in the trustee by the assignment, the trustee should take out a *præcipe* order under the Ontario Rules to continue proceedings in his official name<sup>3</sup>.

When a trustee elects not to proceed with an action which has been commenced by the bankrupt and a stay is entered, a purchaser from the bankrupt of the cause of action will not, without some special circumstance, be allowed to proceed<sup>4</sup>. Where an action has been brought by the committee of a lunatic and the lunatic is subsequently adjudicated bankrupt, the right of action vests in his trustee in bankruptcy; and if the trustee declines to prosecute the action, he cannot be added as a defendant against his will. Where he has been so added, he is entitled to have the action stayed as against himself<sup>5</sup>. But where the trustee elects not to continue a pending action commenced by the debtor, such election in England<sup>6</sup> is not a bar to a subsequent action by the trustee in his representative capacity founded on the same cause of action<sup>7</sup>.

Effect of  
trustee elect-  
ing not to  
proceed.

<sup>2</sup> *In re Branson ex parte Trustee* (1914), 2 K. B. 701; 83 L. J. K. B. 1316; 21 Mans. 160.

<sup>3</sup> *In re N. Brenner & Co., Ltd.* (1921), 49 O. L. R. 71; 19 O. W. N. 445 (Orde, J.). Judgment signed in the name of the debtor is irregular, *S. C. v. Brenner v. American Metal Co.* (1920), 1 C. B. R. 375; 19 O. W. N. 239; 55 D. L. R. 702 (Latchford, J.). See further as to practice: *Bank of London v. Wallace* (1889), 13 P. R. 176; *Gage v. Douglas* (1891), 14 P. R. 126; *Tooke Bros. v. Brock & Patterson* (1907), 3 E. L. R. 270; *McEachren v. Gordon* (1899), 18 P. R. 459. See as to English practice notes to sec. 25.

<sup>4</sup> *Selig v. Lion* (1891), 1 Q. B. 513; 60 L. J. Q. B. 403; see *In re Arnold ex parte O. R.* (1891), 9 Mor. 1; and see as to non-estoppel of liquidator who had elected under the Common Law Procedure Act, 1852, not to proceed with an action brought by the debtor: *Bennett v. Gamgee* (1877), 46 L. J. Ex. 204.

<sup>5</sup> *Farnham v. Millward & Co.* (1895), 2 Ch. 730.

<sup>6</sup> Under the Common Law Procedure Act, 1852, section 142.

<sup>7</sup> *Bennett v. Gamgee* (1876), 2 Ex. D. 11; 46 L. J. Ex. 33.



## Section 20

Extent to which trustee represents creditors.

As to the extent to which the trustee represents the creditors in cases in which the creditors could impeach transactions which the bankrupt himself would be stopped from impeaching<sup>a</sup>, see chapter VI. where the matter is fully discussed.

Proceedings to be taken only for benefit of estate in general.

Where the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large but of an individual creditor who claims a security on it, the trustee ought not to take proceedings for the recovery of the property himself, nor will the individual creditor be allowed to take them in his own name<sup>b</sup>.

Rights of action passing to the trustee.

The rights of action which pass to the trustee are indicated in the notes to section 25<sup>10</sup>.

Where a trustee wishes to continue an action already commenced by the debtor he should, if the right of action is one which has passed to him under the assignment or receiving order, obtain the permission in writing of the inspectors and then take out a *præcipe* order to continue<sup>1</sup>.

Power to employ solicitor or other agent under sec. 20(1)(d).

By section 20(1)(d), the trustee may employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the inspectors.

<sup>a</sup> *Anderson v. Maltby* (1793), 2 Ves, 244, 255; 4 Bro. C. C. 422; *In re Barrett* (1880), 5 O. A. R. 206.

<sup>b</sup> *Ex parte Cooper in re Zucco* (1875), L. R. 10 Ch. 510; 44 L. J. Bank. 121; *Wilmott v. London Celluloid Co.* (1886), 34 Ch. D. 147; 56 L. J. Ch. 89.

<sup>10</sup> The effect of the bankruptcy of the plaintiff or defendant on pending actions will vary in different jurisdictions in cases not touched by the provisions of sections 6(1) and 7(1)(2). See as to the case of plaintiff suing on behalf of himself and all other creditors: *Wolff v. Van Boelen* (1906), 94 L. T. 502, and *cf. Dunn v. Irwin* (1875), 25 U. C. C. P. 111; plaintiff in England adjudicated bankrupt: *Warder v. Saunders* (1882), 10 Q. B. D. 114; *Jackson v. N. E. Railway* (1877), 5 Ch. D. 844; 46 L. J. Ch. 723; action by committee of lunatic who is subsequently adjudicated bankrupt: *Farnham v. Millward* (1895), 2 Ch. 730; 64 L. J. Ch. 816.

<sup>1</sup> *In re Brenner & Co., Ltd.* (1920), 19 O. W. N. 445; Ontario Rules 300-302. In the earlier case of *Brenner v. American Metal Co.* (1920), 19 O. W. N. 239, leave was given to continue. No leave to proceed is necessary so far as the insolvency proceedings are concerned: *In re Brenner & Co., Ltd.*, *supra*. The action will be proceeded with in the official name of the trustee: *Ibid.* After an assignment has been made judgment entered in the name of the assignor is irregular, *S.O.*, citing *Jackson v. North Eastern R. W. Co.* (1877), 5 Ch. D. 844.



This section should be read with subsection 20(2) Section 20  
 which states that the permission is not to be a general permission.

It would seem that the creditors cannot override the directions given by the inspectors for the employment of a particular solicitor<sup>2</sup>. But where one of the inspectors is the managing clerk of a solicitor, it would on general principles be improper to appoint that solicitor as solicitor to the trustee<sup>3</sup>.

The inspectors in giving permission to the trustee to employ a solicitor have power to limit the amount of costs which may be incurred<sup>4</sup>. Where the amount of the costs to be incurred has been limited, the taxing master cannot allow as against the bankrupt's estate a larger sum than the amount so limited<sup>5</sup>, unless the limit of costs to be incurred upon the work originally authorized has been extended by the inspectors<sup>6</sup>. *Seem*, the limit of costs can be extended even after the work has been completed<sup>7</sup>. Where there has been no permission of the inspectors to employ a solicitor, the solicitor's bill of costs cannot be taxed or paid out of the bankrupt's estate<sup>8</sup>.

The permission in writing<sup>9</sup> of the inspectors which is required is a provision for the protection of the estate as between the trustee and the estate; and does not furnish any defence to any proceeding instituted by the trustee without that permission<sup>10</sup>.

When permission is given from time to time to the solicitor to transact separate matters of business and a limit of costs in each case is fixed, the solicitor should bring in his bills showing the work done under

<sup>2</sup> *In re Salmon ex parte O. R.* (1916), 2 K. B. 510; *In re Geiger* (1915), 1 K. B. 439. Contrast *In re Consolidated Diesel Engine Mfrs., Ltd.* (1915), 1 Ch. 192.

<sup>3</sup> *In re and ex parte Gallard* (1896), 1 Q. B. 68; 65 L. J. Q. B. 199; 2 Mans. 515.

<sup>4</sup> *In re Duncan ex parte O. R.* (1892), 1 Q. B. 879; 61 L. J. Q. B. 712; 9 Mor. 61.

<sup>5</sup> *In re Duncan, supra.*

<sup>6</sup> *In re Lawrence & Porter ex parte O. R.* (1910), 55 Sol. J. 94.

<sup>7</sup> *In re Lawrence, supra.*

<sup>8</sup> *In re Geiger* (1915), 1 K. B. 439.

<sup>9</sup> Formerly the permission was not required to be in writing: *In re Vavasour* (1900), 2 Q. B. 309; 69 L. J. Q. B. 685; 7 Mans. 262.

<sup>10</sup> *In re Branson ex parte Trustee* (1914), 2 K. B. 701; 83 L. J. K. B. 1310; 21 Mans. 160.



**Section 20** each authorization. If he lumps the work in one bill so that it is impossible to see whether the sanction has been exceeded in any case, the bankrupt on his discharge may move to reopen the taxation, even where the sum total of the authorizations is greater than the total of the bill of costs.<sup>11</sup> Where a solicitor properly employed does only administrative work he is not entitled to charge solicitor's fees, but only such charges as are fair and reasonable having regard to the work done<sup>1</sup>.

Trustee personally liable to the solicitor for his costs..

The trustee is personally liable to the solicitor for his proper costs irrespective of the assets in his hands<sup>2</sup>, for the solicitor's claim for payment is only against his own client the trustee who retained him<sup>3</sup>. Therefore if either the solicitor or the trustee has been guilty of misconduct, the court can refuse to allow the solicitor's costs to be paid out of the estate, notwithstanding that the costs have been taxed and an *allocatur* made by the taxing officer<sup>4</sup>.

Solicitor's lien.

The solicitor has a lien on all documents the fruits of his own labour or expense<sup>5</sup>, and on what is recovered in an action, even though the recovery of the sum was not the direct result of the action<sup>6</sup>. If the solicitor constitutes himself a trustee for the creditors he will not be entitled to a lien for costs on moneys paid into his hands for a specific purpose<sup>7</sup>. A solicitor may not on the ground of his lien refuse to produce for examination by the trustee documents in his possession<sup>8</sup>,

<sup>11</sup> *In re and ex parte Yeatman* (1916), 1 K. B. 780; 85 L. J. K. B. 789; 3 H. B. R. 30.

<sup>1</sup> *In re Pryor ex parte Board of Trade* (1888), 59 L. T. 256; 5 Mor. 232.

<sup>2</sup> *Ex parte Coates in re Wooding* (1833), 3 D. & C. 626; 1 M. & A. 328; but the trustee is entitled to payment out of the estate unless the judge otherwise directs: Rule 54(3).

<sup>3</sup> *Ex parte Harper in re Pooley* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810.

<sup>4</sup> *Ex parte Harper in re Pooley, supra*.

<sup>5</sup> *Ex parte Yalden in re Austin* (1876), 4 Ch. D. 129; 46 L. J. Bank. 59; and see as to title deeds deposited with him by the bankrupt before his bankruptcy, *Ex parte Calvert in re Messenger* (1876), 3 Ch. D. 317; 45 L. J. Bank. 134.

<sup>6</sup> *Guy v. Churchill* (1887), 35 Ch. D. 489.

<sup>7</sup> *Ex parte Newland in re Clark* (1876), 4 Ch. D. 515.

<sup>8</sup> *In re Toleman & England ex parte Bramble* (1880), 13 Ch. D. 885.



nor is he entitled to a lien on the books of account of the debtor<sup>9</sup>. Section 20

*Quære*, whether a solicitor properly employed by the trustee can apply direct to the court for payment of his bill of costs out of the estate, or whether he should not apply for leave to use the name of the trustee<sup>10</sup>. Application by solicitor for payment.

The court will exercise a summary jurisdiction over a solicitor when he is acting as an officer of the court<sup>11</sup>. Court exercises jurisdiction over solicitor.

It is settled practice not to allow a bankrupt to intervene in or take part in the proceedings unless there are circumstances which justify a special order in his favour<sup>12</sup>. But in a proper case the court has a discretion to allow a bankrupt to attend on the taxation of costs<sup>13</sup>. Bankrupt may not usually intervene.

Sections 20(1)(g)(h) refer to the compromise of claims in favour of or against the debtor which arose prior to the bankruptcy or assignment; while section 20(1)(i) will cover cases arising since the trustee took over the administration of the estate. Compromise under sec. 20 (1)(g)(h)(i)

The court is under no obligation even where the matter is extremely complicated and difficult to understand, to give directions in the matter of a proposed compromise. It is the duty of the trustee as a man of business to decide whether a compromise is reasonable or not, and the inspectors also must form their opinion upon the matter. When any persons concerned object to the terms of the proposed compromise it is for them to satisfy the court that it ought not to be made<sup>14</sup>. Duty of trustee not of court to settle terms of compromise.

Although under the Canadian Act the trustee who has the consent of the inspectors to a proposed com- Trustee may apply for approval of compromise.

<sup>9</sup> Rule 145.

<sup>10</sup> *Ex parte Wingfield and Blew in re Bright* (1903), 1 K. B. 735; 72 L. J. K. B. 287; 10 Mans. 31; and see *ex parte Haynes in re Ring* (1821), 1 G. & J. 35; and *ex parte Coates in re Wooding* (1833), 3 D. & C. 626; 1 M. & A. 328.

<sup>11</sup> *Ex parte Bull in re Ditchman* (1833), 3 D. & C. 116.

<sup>12</sup> *In re Geiger* (1915), 1 K. B. 439.

<sup>13</sup> *In re Duncan ex parte O. R.* (1892), 1 Q. B. 879; 61 L. J. Q. B. 712; 9 Mor. 61; *In re Vavasour* (1900), 2 Q. B. 309; 69 L. J. Q. B. 685; 7 Mans. 262; *In re Geiger* (1915), *supra*; *In re and ex parte Yeatman* (1916), 1 K. B. 780.

<sup>14</sup> *Ex parte Salaman in re Pilling* (1906), 2 K. B. 644; 75 L. J. K. B. 729; 12 Mans. 229. But the trustee may apply in administrative matters; sec. 18(d).



**Section 20** promise is in a much stronger position than the trustee under the English Act<sup>5</sup>, he may be well advised in some cases to apply to the court for approval of the proposed compromise<sup>6</sup>. Where there are joint and separate estates and a compromise has been agreed to by the separate creditors but the joint creditors object to it, the court will sanction the compromise where the separate creditors are the only persons really interested, and there is no proof that it is too advantageous to the persons with whom it is to be carried out, and the settlement will free the estate from expense<sup>7</sup>. It is not a *bona fide* compromise or one which the trustee should enter into without the approval of the court, to settle a claim which has been rejected by the court, on the terms that the costs of the claimant and the opposing creditors should both be paid, even when the claimant has appealed from the decision of the court<sup>8</sup>.

Bankrupt usually has no *locus standi*.

As the trustee has the power to compromise a doubtful claim by agreeing to admit the claim at a less amount by way of settling the doubt, the bankrupt will usually have no *locus standi* to dispute his action. But there is a limit to this rule, and where, in an estate which might be expected to yield a surplus over the proved debts, the trustee compromised a very large claim on terms which but very slightly reduced the dividends of the creditors, but left the debtor nothing at all, the bankrupt was held entitled to have the claim in question fully investigated<sup>9</sup>.

Effect of absence of permission of inspectors.

Where a compromise has been made by the trustee with a creditor or debtor of the bankrupt, it would seem that the creditor or debtor of the bankrupt cannot afterwards set up the fact that the consent of the inspectors was not first obtained<sup>10</sup>.

Compromise of contingent claims.

It has been held under the Winding-up Act that a

<sup>5</sup> See notes to section 20(1) *ante*, and see section 88A.

<sup>6</sup> See *Ex parte Hurlbutt in re Ridgeway* (1890), 61 L. T. 647; 6 Mor. 277; *Ex parte Glass in re Macfadyen* (1908), W. N. 13; *Ex parte Edmunds in re Green* (1886), 53 L. T. 967; 2 Mor. 294.

<sup>7</sup> *Ex parte Clark in re Ridgeway* (1891), 8 Mor. 289.

<sup>8</sup> *Ex parte Edmunds in re Green*, *supra*.

<sup>9</sup> *In re and ex parte Austin* (1876), 4 Ch. D. 13; 46 L. J. Bank. 1.

<sup>10</sup> *Cycle Makers' Co. v. Sim* (1903), 1 K. B. 477; and see *Leeming v. Murray* (1879), 13 Ch. D. 123; 48 L. J. Ch. 737, decided on the Act of 1869.



liquidator may compromise or deal with contingent Section 20  
as well as with other claims<sup>1</sup>.

The wording of section 20(1)(k) is not clear. It is difficult to see how the trustee can disclaim a lease in property forming part of the estate of the debtor; but section 20 (1) (k) is no doubt intended to be read with section 52. Disclaimer under Sec. 20(1) (k).

An appointment as "the solicitor to act for and on behalf of the trustee in all actions, proceedings, and applications, and generally herein on the instructions of the trustee" is not specific enough to sanction taxation of the solicitor's costs for (1) attendance on the public examination of the bankrupt by counsel, (2) opposition to the bankrupt's discharge by counsel, (3) bringing actions against certain debtors to the estate<sup>2</sup>. Sec. 20(2).  
Permission must not be a general permission.

An authority "That Messrs. A. & Co. be employed by the trustee where necessary" does not comply with the section<sup>3</sup>. The section calls for an authority to take particular proceedings or to conduct particular business in the bankruptcy. The authority may be so worded as to cover any number of proceedings or any number of pieces of business so long as it specifies the particular matters. But it is not necessary that a specific authority be produced for every step in an action<sup>4</sup>.

*Quære*, whether the deed or transfer from the trustee to the purchaser is a "document made or executed under authority of this Act" within the meaning of section 11(4). Sec. 20(3)(a)  
Sales of property by the trustee.

It has been held that an ordinary sale *en bloc* of all unrealized assets of the estate will not, without more, transfer to the purchaser any right of action which the trustee may have to set aside as invalid warehouse receipts not objected to by the trustee<sup>5</sup>. It was said in a case under a former Canadian Act, that a trustee cannot transfer the right of action to avoid a mort-

<sup>1</sup> *In re Stratford Fuel Ice Construction Co., Coughlin & Irwin's Claim* (1913), 28 O. L. R. 481, 487.

<sup>2</sup> *Ex parte Nichols in re White* (1902), W. N. 114.

<sup>3</sup> *In re Vavasour* (1900), 2 Q. B. 309; 69 L. J. Q. B. 685; 7 Mans. 262.

<sup>4</sup> *In re Vavasour* (1900), 2 Q. B. 309; 69 L. J. Q. B. 685; 7 Mans. 262.

<sup>5</sup> *Mason v. Merchants' Bank* (1877), 27 U. C. C. P. 383.



**Section 21** gage which he could have avoided in the interest of creditors<sup>7</sup>, but section 35 now gives the creditor the right to take proceedings in the name of the trustee in matters which in his opinion would be for the benefit of the estate.

Sec. 20(3)(b) See as to fraudulent seizures of land under execution in Quebec, Criminal Code, R. S. C. 1906, c. 146, s. 423; as to forced sales of immoveables in Quebec, Civil Code, Arts. 1585 to 1591, and Code of Civil Procedure, Chap. XXX., particularly Arts. 735-788; R. S. Q. 1909, Arts. 7552-7557; 1919, c. 70 (Art. 7554); 1918, c. 79 (Art. 700a); 1915, c. 85; 1906, c. 42, s. 8 (Art. 1352).

Power to  
allow bank-  
rupt to  
manage  
property.

Allowance  
to bankrupt.

21. The trustee, with the permission in writing of the inspectors, may appoint the debtor himself to superintend the management of the property of the debtor or any part thereof, or carry on the trade (if any) of the debtor for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct, and may, with like permission, make from time to time such allowance as he may think just to the debtor out of his property for the support of the debtor and his family, or in consideration of his services, if he is engaged in winding-up his estate, but any such allowance may be reduced by the court.

**Cross References Act:** Trustee may carry on the business for the beneficial winding-up of the same, 20(1)(b); permission of inspectors, 20; inspectors generally, 43.

**Analogous Legislation:** English Act, 1914, ss. 57, 58; Canadian Act, 1875, s. 89.

Where a receiver is appointed by the court, he has power to employ the debtor to assist him<sup>8</sup>.

<sup>7</sup> *Per* Gwynne, J., in *Bertram v. Pendry* (1877), 27 U. C. C. P. 371; and see *Seear v. Lawson* (1880), 15 Ch. D. 426; 49 L. J. Bank. 69; and rights of action, see notes to 20(1)(a), 20(1)(c), section 17, and section 25.

<sup>8</sup> *Ex parte Gordon in re Gomersall* (1875), L. R. 20 Eq. 291; 44 L. J. Bank. 97.



When the bankrupt carries on the business with the sanction of the trustee, he becomes his agent and is entitled to an indemnity against liabilities incurred in such trading; but not when he trades without the knowledge of the trustee<sup>9</sup>. Where a bankrupt trades without the knowledge of the trustee any property which he may acquire by so trading will, subject to the provisions of section 34, pass to the creditors under the bankruptcy<sup>10</sup>, but if the trustee permits him to trade or carry on business and knowingly allows him to treat with new creditors who, in ignorance of his circumstances, deal with him upon the faith of his ability to contract, especially where he has changed his trade or place of carrying it on, the new creditors have a right to be paid out of the newly acquired assets in priority to the creditors under the bankruptcy<sup>1</sup>. Where the bankrupt trades with the knowledge of the trustee, the new creditors if unsecured must enforce their rights before the bankrupt disposes of his property; for if the property is sold and the proceeds paid to the trustee they will have no lien on them<sup>2</sup>.

**Section 21**  
Bankrupt carrying on business.

It may be that if the bankrupt is employed to carry on his trade and is from time to time paid money by the trustee, this is evidence of such a contract between him and the trustee as will enable him to recover on a *quantum meruit*<sup>3</sup>.

The allowance which the trustee is authorized to make to the bankrupt may consist of furniture and

Allowance to debtor.

<sup>9</sup> *Ex parte Kearley in re Clark* (1889), 60 L. T. 335; 6 Mor. 42.

<sup>10</sup> *Ex parte Ford in re Caughey* (1875), 1 Ch. D. 521; *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806; 1 Mans. 207.

<sup>1</sup> *Troughton v. Gilley* (1766), Amb. 630; *Englebach v. Nixon* (1875), L. R. 10 C. P. 645; 44 L. J. C. P. 396; *Tucker v. Hernaman* (1853), 4 DeG. M. & G. 395; 22 L. J. Ch. 791; *In re Burr ex parte Pannell* (1901), 84 L. T. 327; *Ex parte Bolland in re Dysart* (1878), 9 Ch. D. 312; 47 L. J. Bank. 74. There is no Canadian section dealing with the disposition of assets in a second bankruptcy. See English section 39. Creditors who do not share under a composition, but postpone their debts until after the discharge of the debtor, do not lose the right to receive dividends with the new creditors in a subsequent bankruptcy: *Ex parte Russell in re Winn* (1876), 2 Ch. D. 424; 45 L. J. Bank. 85.

<sup>2</sup> *Ex parte Robertson in re Magnus* (1873), L. R. 8 Ch. 962.

<sup>3</sup> *Coles v. Barrow* (1813), 4 Taunt. 774.



**Section 22** other property, which when properly allotted to the bankrupt gives him title to the property and the right to dispose of it as he sees fit\*.

Protection of trustee from personal liability in certain cases.

22 (1) Where the trustee has seized or disposed of any property in the possession or on the premises of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, without notice of any claim by any person in respect of such property and it is thereafter made to appear that the property was not at the date of the making of said receiving order or assignment the property of the debtor, the trustee shall not be personally liable for any loss or damage arising from such seizure or disposal sustained by any person claiming such property, nor for the costs of any proceedings taken to establish a claim thereto, unless the court is of opinion that the trustee has been guilty of negligence in respect of the same.

Inspection of goods held in pledge.

- (2) Where any goods of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, are held by any person by way of pledge, pawn, or other security, it shall be lawful for the trustee, after giving notice in writing of his intention to do so, to inspect the goods, and, where such notice has been given, such person as aforesaid shall not be entitled to realize his security until he has given the trustee a reasonable opportunity of inspecting the goods and of exercising his right of redemption if he thinks fit to do so.
- (3) Where any goods in the charge or possession of a debtor at the time when a receiving order or an authorized assignment is made

\* *Brown v. Hickinbotham* (1881), 50 L. J. Q. B. 426.



are alleged to be in his charge or possession subject to the ownership or a special or general property right, or right of possession in another person, and whether or not such goods are held by the debtor under or subject to the terms of any lien, consignment, agreement, hire receipt, or order, or any agreement providing or implying that the ownership of, property in, or right to possession of such goods, or other or like goods in exchange or substitution, shall vest in or pass to the debtor only upon payment of defined or undefined moneys, or upon performance or abstention from performance of any acts or conditions, the person alleged or claiming to own such goods or such special or general property or right of possession therein or thereof shall not, by himself or his agents or servants, nor shall his agents or servants, remove or attempt to remove such goods or any thereof out of the charge or possession of the debtor, or of the authorized trustee or any actual custodian thereof, until the elapse of fifteen days after delivering notice in writing to the trustee of intention to so remove. It shall not be implied from these provisions that the rights of others than the trustee have been thereby in any manner extended.

## Section 22

Person alleged or claiming to own goods in charge or possession of debtor must give 15 days notice to trustee of intention to remove them.

**Cross References Act:** Property defined, 2(*dd*); property vesting in trustee, 6(3), 10, 25; proof by secured creditors, 46; penalty for removing debtor's goods without notice, 97.

**Analogous Legislation:** English Act, 1914, ss. 61, 59.

Section 22(3) was first enacted by sec. 21 of *The Bankruptcy Act Amendment Act*, 1921.

What is the property of the debtor may depend partly on provincial law<sup>5</sup>.

<sup>5</sup> See *In re Barrett* (1880), 5 O. A. R. 206, 214, and notes to sections 25 and 32.



**Sections  
23, 24**

Books to be  
kept by  
trustee.

23. The authorized trustee of a bankrupt or assignor shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt or authorized assignor may, subject to the control of the court, personally or by his agent inspect any such books.

**Cross References Act:** Trustee to take possession of books of account of debtor, 17(1); minutes of proceedings, 42(8), 77(1)(2); offence of failing to observe provisions of the Act, 96(c); inspection of debtor's statement of affairs, 54(2).

**Cross References Rules:** Trustee to keep documents after his discharge, 110; no person to withhold from trustee books of account of debtor, 145; trustee to keep for six years all current books of record, 110.

**Analogous Section:** English Act, 1914, s. 86; Canadian Act, 1875, s. 41.

The rules do not prescribe what books are required to be kept. Under the English Rules the trustee is required to keep a Record Book and a Cash Book. In the Record Book are to be recorded all minutes, and all proceedings had, and resolutions passed at any meeting of creditors or inspectors and all such matters as may be necessary to give a correct view of his administration of the estate. In the Cash Book he is required to enter from day to day the receipts and payments made<sup>6</sup>. A debtor has no right in England to inspect the trustee's "Record Book," nor has the court power to give him leave to do so<sup>7</sup>.

Report to  
creditors by  
trustee.

- 24 (1) The authorized trustee of a bankrupt or assignor shall from time to time report,—  
(a) when required by the inspectors, to every creditor; and,  
(b) when required by any specific creditor, to such creditor,

<sup>6</sup> E. Rules 360, 361; and see E. R. 337, as to trading accounts.

<sup>7</sup> *In re and ex parte Solomons* (1904), 2 K. B. 917; 73 L. J. K. B. 1029; 11 Mans. 345.



showing the condition of the debtor's estate, the moneys on hand, if any, and particulars of any property remaining unsold. The trustee shall be entitled to charge against the estate of the debtor, for the preparation and delivery of any such report, only his actual disbursements. Section 24

- (2) The authorized trustee of a bankrupt or assignor (but not the trustee under a composition, extension or arrangement of a debtor's debts or affairs) shall promptly after their receipt or preparation mail to the Dominion Statistician, Department of Trade and Commerce, Ottawa, a true copy of,—
- (a) the notice referred to in subsection four of section eleven of this Act;
  - (b) the statement referred to in subsection one of section fifty-four of this Act;
  - (c) the abstract of receipts and disbursements and the dividend sheet referred to in subsection two of section thirty-seven of this Act;
  - (d) every order made by the court upon the application for discharge of any bankrupt or authorized assignor; and,
  - (e) the statement prepared by the trustee upon which a final dividend is declared.
  - (f) any order made under subsection eighteen of section thirteen of this Act annulling any adjudication of bankruptcy.
- (3) Any person shall be entitled to examine and make copies of all or any of the documents mentioned in subsection two hereof, which are in the possession of the trustee. Documents to be forwarded to Ottawa.  
Right to examine.

**Cross References Act:** Remuneration of trustee, 40(1) (2) (3) ; taxation of trustee's disbursements, 40(4).

**Cross References Rules:** Costs, taxation and fees, 54 to 62.

Section 24(2)(b) was first enacted by sec. 22 of *The Bankruptcy Act Amendment Act, 1921.*



*Administration of Estate.***Section 25**

Description  
of debtor's  
property  
divisible  
amongst  
creditors.

25. The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:—

- (i) Property held by the debtor in trust for any other person;
- (ii) Any property which as against the debtor is exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

But it shall comprise the following particulars:

- (a) All such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment, and, in the case of a bankrupt, all property which may be acquired by or devolve on him before his discharge; and,
- (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of the property as might have been exercised by the debtor for his own benefit at the date of said petition or assignment, or, in the case of such bankrupt, before his discharge.

**Cross References Act:** Property defined, 2(*dd*) ; property vesting in trustee on making of R. O., 6(3) ; on making of A. A., 10 ; relation back of bankruptcy, 4(10) ; R. O. and A. A. take precedence of process, 11(1) (10) ; R. O. and A. A. not within operation of provincial enactments, 11(4) ; presentation of bankruptcy petition, 4(4) ; discharge, 58 *et seq.* ; proof of debts, 45, 46 ; debts provable, 44 ; examination as to subsequently acquired property, 56(1).

**Cross References Rules:** Presentation of bankruptcy petition, 76.

**Analogous Legislation:** English Acts, 1914, s. 38 ; 1883, s. 44. Canadian Acts, 1875, s. 16 ; 1869, s. 10. American Acts, 1898, s. 70 ; 1867, s. 14 ; R. S., s. 5044 ; 1841, s. 3 ; 1860, ss. 10, 11, 17, 27, 50.



## ANALYSIS OF NOTES.

*Description of Debtor's Property Divisible Amongst Creditors.*Section 25

- I. General scope of the section.
- II. Position of the trustee as compared with that of debtor.
  - A. Position of trustee is both inferior and superior to that of debtor.
  - B. The trustee takes the property for payment of creditors, but the bankrupt has no right to intervene.
  - C. But he has a right to his surplus assets.
  - D. A debtor may not encumber the profits of his business.
- III. Trustee's right as against prior trustee.
- IV. Property which does not vest in the trustee for division among creditors.
  - A. Property held by debtor in trust for any other person—
    1. Property held by debtor as bare trustee.
    2. Property held in fiduciary capacity by factor, etc.
    3. Trust funds mixed with others.
    4. Property which the debtor believed he held as trustee.
  - B. Property exempt from execution or seizure.
  - C. Interests defeasible on bankruptcy—
    1. Rights of trustee on defeasance.
    2. Trustee takes what bankrupt entitled to; contingent interests.
  - D. Rights of action which do not pass to the trustee.
  - E. After acquired property passes to the trustee in a qualified sense.
  - F. The court may order the trustee as its officer to return certain property.
- V. Property which vests in the trustee for division among creditors—
  - A. Property of the debtor at the date of the presentation of any petition, etc.
  - B. The object of the bankruptcy law.
  - C. What is property is defined in the Act, but it also depends on provincial law—
    1. Rights of action which do and do not pass to the trustee.
      - (a) Rights of action founded in contract.
        - (i) Contracts *in fieri* for personal services.
        - (ii) Personal earnings of bankrupt.
      - (b) Rights of action founded in tort.
      - (c) Whether a cause of action may be split.
      - (d) Person suing on behalf of himself and other creditors.
      - (e) Practice as regards plaintiffs and defendants.
        - (i) Plaintiff becoming bankrupt.
        - (ii) Defendant becoming bankrupt.
    2. Contracts with the debtor—
      - (a) Contracts not necessarily terminated by bankruptcy.
      - (b) Disclaimer of onerous contracts or property.
      - (c) Position of trustee who completes a contract with his own money.
  3. Shares.
  4. Alleged gifts.
  5. Miscellaneous matters.
  - D. The trustee should perfect his title to a chose in action.
  - E. After-acquired property.
  - F. The capacity to exercise powers.

Section 25 is one of the most important sections of I. General the Act. It has been taken from the corresponding <sup>scope of</sup> section.



**Section 25** English section<sup>8</sup> which, however, only applies where there has been an adjudication of bankruptcy, for there is no such thing as an authorized assignment under the English Act<sup>9</sup>. Under the English Act the property of the debtor vests in the trustee when the debtor is adjudged bankrupt, not as under the Canadian Act when a receiving order is made. Section 25 must be read with section 6(3) and with section 4(10), the former of which treats of the vesting of the property of the debtor in the trustee, the latter of the relation back of the bankruptcy of the debtor, whatever that may mean. The relation back of the title of the trustee, the meaning and effect of which are treated in the notes to section 4(10), is brought about by reading section 6(3) which vests "the property of the debtor" in the trustee, with section 25, which says: "The property of the debtor divisible among his creditors (in this Act referred to as *the property of the debtor*) . . . shall comprise all such property as may belong to or be vested in the debtor *at the date of the presentation of any bankruptcy petition*."

II. Position of the trustee as compared with that of debtor.

Generally speaking, all the property of the bankrupt vests in the trustee, as the legal representative of the debtor<sup>1</sup>; but he takes it subject to all rights and equities to which it was subject while held by the debtor<sup>2</sup>. In some respects, however, the trustee is in an inferior position to the bankrupt, in others he occupies a superior position.

As to the inferior position of the trustee:—

A.  
It is both inferior.

1. He does not take property which the debtor holds in trust for any other person<sup>3</sup>.

2. Nor does he take certain property which is exempt from seizure under execution<sup>4</sup>.

<sup>8</sup> Section 38.

<sup>9</sup> See, however, provisions with respect to a debtor's petition, sections 3 and 6; and see *English Deeds of Arrangement Act*, 4-5 Geo. V. c. 47.

<sup>1</sup> *In re Mapleback ex parte Caldecott* (1876), 4 Ch. D. 150; 13 Cox. 374. See Chapter VI.

<sup>2</sup> *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806; 12 Mans. 207; see Chapter VI. and notes to sections 17, 6(3) and 10.

<sup>3</sup> Section 25(1).

<sup>4</sup> Section 25(ii).



3. He does not take property of the debtor which is subject to a gift over on bankruptcy. Section 25

4. Certain rights of action do not pass to the trustee.

5. With respect to property acquired by the debtor after the making of the receiving order, the trustee must intervene in order to perfect his title<sup>5</sup>.

6. In certain cases the trustee as an officer of the court will not be allowed to retain property which the debtor might have retained.

On the other hand the position of the trustee is superior to that of the debtor in several respects:— And superior to that of debtor.

1. The relation back of his title avoids transactions which the debtor could not avoid<sup>6</sup>.

2. As the representative of the creditors he may impeach transactions which are in fraud of creditors, or which prefer a creditor or creditors to the others<sup>7</sup>.

3. In the same capacity he may in England impeach other transactions which are either contrary to the general spirit of the bankruptcy laws or are contrary to specific sections of the Act<sup>8</sup>.

4. He may in certain cases disclaim property of an onerous nature.

The trustee takes the bankrupt's property for an absolute estate in law, but for limited purposes only, namely, for the payment of the creditors under that bankruptcy and that bankruptcy only, that is for the payment of principal and interest and all costs of the bankruptcy. Subject to that he is trustee to the bankrupt for the surplus; but as such trustee he has a better position than an ordinary trustee; for the debtor has not the ordinary right of a *cestui que trust* to intervene until the surplus has been ascertained to exist, and all the creditors and interest and costs have been paid<sup>9</sup>. B. Trustee takes property to pay creditors but bankrupt has no right to intervene.

<sup>5</sup> Section 34.

<sup>6</sup> See section 4(10).

<sup>7</sup> See notes to section 3(b)(c), and notes to section 17.

<sup>8</sup> See section 3(c) and notes to section 17 and sections 29, 30, 31.

33.

<sup>9</sup> *Per* Farwell, J., in *Bird v. Philpott* (1900), 1 Ch. 822; 69 L. J. Ch. 487; 7 Mans. 251; *Ex parte Sheffield in re Austin* (1879), 10 Ch. D. 434; *In re Leadbitter* (1878), 10 Ch. D. 388; 48 L. J. Ch. 242. See as



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But where the debtor is able to pay all his debts in full and so is interested in keeping the costs as low as possible, he may be allowed to attend taxation<sup>10</sup>.

C.  
But he has a  
right to his  
surplus  
assets.

A bankrupt has a right during his bankruptcy to the surplus assets and may dispose of them by deed or will even before they are ascertained, and charges validly so created will be good as against his trustee in a subsequent bankruptcy which occurs before he has obtained his discharge under his first bankruptcy<sup>1</sup>.

D.  
Debtor may  
not encumber  
profits of his  
business, etc.

A debtor cannot by any assignment or charge give a good title as against his trustee to profits of his business which will be earned after the commencement of his bankruptcy; for they are not his property<sup>2</sup>, nor to moneys due under executory contracts the execution of which are dependent on the continuation of the business of the debtor<sup>3</sup>, but he can assign or charge property already earned<sup>4</sup>.

III. Trustee's right  
against prior  
trustee.

It may be that the trustee in bankruptcy can treat the trustee under an authorized assignment as a *trustee de son tort*, as where the making of the authorized assignment is the act of bankruptcy on which the petition is founded<sup>5</sup>. If such be the case the trustee in bankruptcy can claim from the trustee under the authorized assignment all the property of the bankrupt which remains in his possession unconverted, and the value of all property of which he has taken possession

to bankrupt's rights to impeach the acts of his assignee: *Ex parte Archer* (1826), 2 Glyn & J. 110; *Ex parte Malachy* (1840), 1 Mont. D. & D. 353; 10 L. J. Bank. 7.

<sup>10</sup> *In re and ex parte Geiger* (1915), 1 K. B. 439; 84 L. J. K. B. 589; 1 H. B. R. 44; and where there has been an infringement of the Act or rules with respect to costs, the debtor may, after discharge, have the taxation re-opened: *In re Yeatman* (1916), 1 K. B. 780; 85 L. J. K. B. 789; 3 H. B. R. 30.

<sup>1</sup> *Bird v. Philpott* (1900), 1 Ch. 822; 69 L. J. Ch. 487; 7 Mans. 251.

<sup>2</sup> *In re Jones ex parte Nichols* (1883), 22 Ch. D. 782; 52 L. J. Ch. 635. See *Mercer Vans Colina* (1900), 1 Q. B. 130n; 67 L. J. Q. B. 424; 4 Mans. 363; *Ex parte O. R. in re Beall* (1899), 1 Q. B. 688; 68 L. J. Q. B. 462; 6 Mans. 163; *Ex parte Collins in re Rogers* (1894), 1 Q. B. 425; 63 L. J. Q. B. 178; 1 Mans. 387; contrast *Ex parte Moss in re Toward* (1884), 14 Q. B. D. 310; 54 L. J. Q. B. 126; *Drew v. Josolyne* (1887), 18 Q. B. D. 590; 56 L. J. Q. B. 490.

<sup>3</sup> *Wilnot v. Alton* (1897), 1 Q. B. 17; 66 L. J. Q. B. 42; 4 Mans. 17.

<sup>4</sup> *Ex parte Moss in re Toward*, *supra*; *Drew v. Josolyne*, *supra*.

<sup>5</sup> See notes to sections 3(a), 4(10), 9, 10, 17.



and converted since the commencement of the title of the trustee in bankruptcy<sup>6</sup>. Section 25

The only trust property which does not pass to the trustee in bankruptcy is that in which the debtor, being a bare trustee, has no beneficial interest<sup>7</sup>. If the debtor has any beneficial interest the property will pass. Thus where the debtor holds as trustee property such as leaseholds with onerous covenants on which he may be liable, he is entitled to a right of indemnity. For this he has a first charge or lien on the trust property, and so he has such an interest in the property that on his bankruptcy the legal term will pass to his trustee in bankruptcy<sup>8</sup>. It has been said by Fletcher Moulton, L.J., that in such a case the trustee in bankruptcy will take the same position in respect of the property as the bankrupt, though to give him this interest it is not necessary that he should formally become trustee of the property in question. It will be sufficient that from and after the bankruptcy the interest which the bankrupt previously enjoyed beneficially is now held by him in trust for the trustee in bankruptcy as representing his estate<sup>9</sup>.

IV. Property not vesting in trustee.

A. Property held by debtor in trust for any other person.

(1) Property held by debtor as bare trustee.

Property in the possession of a factor or other person in a fiduciary capacity empowered to dispose

<sup>6</sup> *In re Riddeough ex parte Vaughan* (1884), 14 Q. B. D. 25; 1 Mor. 258; *In re Prigoshen ex parte O. R.* (1912), 2 K. B. 494; 81 L. J. K. B. 1199; 19 Mans. 323; *Ex parte Parsons in re Cook* (1909), 53 Sol. J. 359; and see as to a claim by the trustee under the assignment for personal services: *In re Richards* (1884), 1 Mor. 242; *In re Foster ex parte O. R.* (1895), 72 L. T. 364, and payments to agents: *In re Foster ex parte Rawlings* (1887), 4 Mor. 292.

<sup>7</sup> *Morgan v. Swansea Urban Sanitary Authority* (1878), 9 Ch. D. 582, 585; *Carvalho v. Burn* (1833), 4 B. & Ad. 382, 392; *Boddington v. Castelli* (1853), 1 E. & B. 879; 23 L. J. Q. B. 31; *In re Dodds ex parte Brown* (1891), 8 Mor. 86; and see *Ludlow v. Browning* (1708), 11 Mod. 138; *Ex parte Gennys in re Elford* (1829), 1 M. & M. C. A. 258; *In re Caine's Mortgage Trusts* (1918-19), B. & C. R. 279.

<sup>8</sup> *St. Thomas Hospital v. Richardson* (1910), 1 K. B. 271; 79 L. J. K. B. 488; 17 Mans. 129; *Jennings v. Mather* (1902), 1 K. B. 1; 70 L. J. K. B. 1032; 8 Mans. 329. Note that moneys recovered by the trustee in bankruptcy under a right of indemnity against the *cestui que trust* under such a lease must be paid to the principal creditor, and are not distributable among the other creditors: *Ex parte St. Thomas Hospital in re Richardson* (1911), 2 K. B. 705; 80 L. J. K. B. 1232; 18 Mans. 227; cf. *In re Law Guarantee Society* (1914), 2 Ch. 617; 84 L. J. Ch. 1. The trustee cannot make a profit for the bankrupt's estate out of the right of indemnity.

<sup>9</sup> *Per Fletcher-Moulton, L.J., St. Thomas Hospital v. Richardson* (1910), 1 K. B. 271, 279; 79 L. J. K. B. 488; 17 Mans. 129.



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(2) Property held in fiduciary capacity by factor, etc.

of it for his principal does not pass to his assignee in bankruptcy<sup>10</sup>, and the *cestui que trust* has a lien upon such property or the proceeds if they can be ascertained<sup>1</sup>, *aliter* if the same cannot be traced<sup>2</sup>. On the same principle, it has been decided that if a sum of money is entrusted by a principal to a debtor to buy goods, the money will be considered trust funds in the debtor's hands; and the principal has the same interest in the goods when bought as he had in the funds producing them. If therefore the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the money used in the purchase<sup>3</sup>. And where money is advanced by way of loan for the purpose of being applied for a specific purpose and is accepted on that understanding, the lender is entitled to follow and recover the money as if it had been in terms a trust fund<sup>4</sup>. But when a person pays money into a bank to be applied in a specific manner and the banker stops payment before taking any step toward applying it to the purpose, the payer cannot recover the money paid, but has merely a right of proof as a general creditor<sup>5</sup>. It is otherwise if the money has been specifically appropriated to that purpose<sup>6</sup>. As a trustee can never assert a title of his own

<sup>10</sup> *Taylor v. Plumer* (1815), 3 M. & S. 562; 2 Rose 457.

<sup>1</sup> *Ex parte Sayers* (1800), 5 Ves. 169; *In re Cotton ex parte Cooke* (1913), 108 L. T. 310; *In re Hulton ex parte Manchester and County Bank* (1891), 8 Mor. 69; *Tooke v. Hollingworth* (1793), 5 T. R. 215; *In re Coleman* (1875), 36 U. C. Q. B. 559, 583; *In re Williams* (1871), 31 U. C. R. 143; *Cotter v. Mason* (1870), 30 U. C. Q. B. 181.

<sup>2</sup> *Culhame v. Stuart* (1884), 6 O. R. 97; *Trusts & Guarantee Co. v. Munro* (1909), 19 O. L. R. 480.

<sup>3</sup> *Long v. Carter* (1896), 26 S. C. R. 430; *Harris v. Truman* (1882), 9 Q. B. D. 264.

<sup>4</sup> *Gibert v. Gonard* (1884), 54 L. J. Ch. 439.

<sup>5</sup> *In re Barned's Banking Co. ex parte Massey* (1870), 39 L. J. Ch. 635; cf. *In re Mills Bawtree & Co. ex parte Stannard* (1893), 10 Mor. 193; and contrast *Ex parte Plitt in re Brown* (1889), 6 Mor. 81.

<sup>6</sup> *Farley v. Turner* (1857), 26 L. J. Ch. 710; and see as to moneys in the hands of stock brokers: *King v. Hutton* (1900), 2 Q. B. 504; 69 L. J. Q. B. 786; 7 Mans. 393. See as to the relation between banker and customer for illustrations of the principle of implied trusts: *Ex parte Waring in re Agra Bank*, 36 L. J. Ch. 151; *In re Hallett's Estate* (1879), 13 Ch. D. 696; 49 L. J. Ch. 415; *Thompson v. Clydesdale Bank* (1893), A. C. 282; 62 L. J. P. C. 91; *Ex parte Massey in re Barned's Bank* (1870), 39 L. J. Ch. 635; *Ex parte Broad in re Neck* (1884), 13



to trust property, if he chooses to mix trust property and his own together the whole becomes trust property subject to this, that whatever he can distinguish as his own he can take out<sup>7</sup>. Section 25

The decision in *Re Hallett's Estate* is important on the question of following trust funds which have been mixed with other funds. It was decided in that case<sup>8</sup>, that when a trustee mixes trust moneys with private moneys in one account the *cestui que trust* has a charge on the aggregate amount for his trust fund; and that when payments out are made the payments out are not to be appropriated against the first payments in as in *Clayton's case*<sup>9</sup>; for the debtor is supposed to have been honest rather than dishonest and to have made payments out of his own private moneys first. Similarly when out of such a mixed fund the debtor has purchased an investment in his own name and applied the balance to his own purpose, his representatives cannot successfully maintain that it was purchased with his own money<sup>10</sup>. But the charge of the *cestui que trust* does not extend to any more of the mixed fund than is represented by the smallest balance to the credit of the account since the trust funds were paid in<sup>1</sup>. (3) Trust funds mixed with others.

There may be cases where although no valid trust has been created and the debtor is therefore not a trustee, the court will consider it inequitable for his trustee to retain the property<sup>2</sup>. (4) Property debtor believed he held as trustee.

The second class of property which is not divisible amongst creditors<sup>3</sup> is property which as against the debtor is exempt from execution or seizure under legal B. Property exempt from execution or seizure.

Q. B. D. 740; 54 L. J. Q. B. 79; *Ex parte Lloyd in re Watson & Co.*, 91 L. T. 665; *Thompson v. Giles* (1824), 2 B. & C. 422; *Capital and Counties Bank v. Gordon* (1903), A. C. 240.

<sup>7</sup> *Frith v. Cartland* (1865), 2 Hem. & M. 417; 34 L. J. Ch. 301.

<sup>8</sup> *In re Hallett's Estate* (1879), 13 Ch. D. 696; 49 L. J. Ch. 415.

<sup>9</sup> (1816), 1 Mer. 572.

<sup>10</sup> *In re Oatway* (1903), 2 Ch. 356; 72 L. J. Ch. 575.

<sup>1</sup> *Roscoe, Ltd. v. Winder* (1915), 1 Ch. 62.

<sup>2</sup> *In re Bell ex parte Debtor* (1908), 99 L. T. 939.

<sup>3</sup> The following cases may be referred to on the construction of those sections of Provincial Assignments Acts which deal with non-exigible property outside the assignment: *McGregor v. Campbell* (1909), 19 M. L. R. 38; 11 W. L. R. 153; *In re Unitt and Pratt* (1893), 23 O. R. 78; *Reinhardt v. Hunter* (1905), 6 O. W. R. 421.



**Section 25** process in accordance with the laws of the province within which the property is situate and within which the debtor resides<sup>4</sup>. Property situate in a province in which the debtor does not reside will therefore be divisible amongst creditors if it falls within section 25(b). Tools and implements ordinarily used in the debtor's occupation are no longer exempt from seizure when he changes the occupation to one in which the tools and implements are not ordinarily used<sup>5</sup>. The \$500 exemption from execution under the Homestead Act of British Columbia is not an absolute right but a privilege or option which must be claimed within a reasonable time<sup>6</sup>.

C.  
Interests  
defeasible on  
bankruptcy,  
etc.

In addition to the exceptions given in 25(i) and 25(ii), there may be other property held or enjoyed by the bankrupt which does not pass to his trustee in bankruptcy. Property limited by other persons to the debtor until bankrupt and then over<sup>7</sup>, will not pass to the trustee. But a man may not limit his own property to himself in this way. A simple stipulation that upon a man's becoming bankrupt that which was his property up to the date of the bankruptcy should go over to someone else and be taken away from his creditors is void as being in violation of the policy of

<sup>4</sup> The following Provincial Acts and cases may be referred to: Nova Scotia, 48 Vic., 1885, c. 34; R. S. N. S. 1900, c. 28. New Brunswick, C. S. N. B. 1903, c. 128, s. 34. Prince Edward Island, 51 Vic., 1888, c. 3, s. 43. Quebec, C. C. P. Arts. 598, 599, 1147A; R. S. Q. 1909, Arts. 2091-2097. Ontario, R. S. O. 1914, c. 80, s. 3; 1914, c. 28, ss. 44-49. Manitoba, R. S. M. 1913, c. 66, s. 29, c. 107; 1914, c. 37; 1915, c. 23, and see *Logan v. Rea* (1903), 40 C. L. J. 44; *Roberts v. Hartley* (1902), 14 M. L. R. 284; *Bates v. Cannon* (1908), 18 M. L. R. 7; 8 W. L. R. 575. British Columbia, R. S. B. C. 1911, c. 100, s. 79, s. 10; *In re Ley* (1900), 7 B. C. R. 94. Alberta, C. O. A. 1915, c. 27. Saskatchewan, R. S. S. 190, c. 47; 1915, c. 31; 1916, c. 37, s. 10; 1915, c. 29; 1916, c. 27; 1919, c. 81. Yukon, C. O. Y. 1902, c. 25; C. O. Y. 1914, c. 31. North-West Territories, C. O. N. W. T. 1898, c. 27; amended by N. W. T. 1898, No. 14 and by N. W. T. 1901, c. 16, and see *West v. Ames Holden Co.* (1897), 3 Terr. L. R. 17. See as to whether the right of exemption is an absolute right or a privilege: *In re Ley*, *supra*.

<sup>5</sup> *Wright v. Hollingshead* (1895), 23 O. A. R. 1, documents of a bankrupt on which he depends to carry on his business are not "tools of his trade": *In re Sherman* (1915), 1 H. B. R. 231.

<sup>6</sup> *Pilling v. Stewart et al.* (1895), 4 B. C. R. 94.

<sup>7</sup> See where an interest absolute purporting to be defeated on bankruptcy without any limitation over was treated as *in terrorem* only: *Bird v. Johnson* (1854), 18 Jur. 976.



the bankruptcy law<sup>8</sup>. Thus a limitation of a settlor's own property until bankruptcy is void as against his creditors<sup>9</sup>, though a similar settlement defeasible on a voluntary assignment has been held to be valid<sup>10</sup>; and a settlement which would be void as against the trustee because limited to be defeated on bankruptcy may yet contain other defeasance clauses which if they operate before the occurrence of bankruptcy may validly transfer the estate limited over<sup>1</sup>. But where an ante-nuptial settlement is made of a man's own property to pay the income to himself during life or until he should be outlawed or declared bankrupt and then to his wife for life, and the settlor becomes bankrupt before any of the other defeasance clauses come into operation, the trustee will acquire a non-forfeitable life interest of the bankrupt in the property; for as against the trustee the limitation is void; but as between the settlor and his wife it is not void and so far as her interest is concerned the forfeiture has taken place<sup>2</sup>. A condition in a contract by a builder that in case of bankruptcy his materials on the land of the landlord should be forfeited to the landlord is void<sup>3</sup>; though where a lien is given to the landlord on the chattels in question as from the commencement of the contract, a power may be given to him to seize the

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<sup>8</sup> *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19. See Chapter VI., ante.

<sup>9</sup> *Higinbotham v. Holme* (1811), 19 Ves. 88; *Lester v. Garland* (1832), 5 Sim. 205; *Ex parte Williams in re Thompson*, 7 Ch. D. 138; 47 L. J. Bank. 26; *In re Brewers' Settlement* (1896), 2 Ch. 503; 65 L. J. Ch. 821; as to what is not such a limitation see *In re Ashby ex parte Wreyford* (1892), 1 Q. B. 872; 9 Mor. 77; *In re Denny's Trustee, Denny v. Warr* (1919), 1 K. B. 583; 88 L. J. K. B. 679; (1918-19), B. & C. R. 139.

<sup>10</sup> *Brooke v. Pearson* (1859), 27 Beaven 181; 5 Jur. (N.S.) 781; *Knight v. Browne* (1861), 7 Jur. (N.S.) 894; 30 L. J. Ch. 649. See where a gift over on "alienation" was held to apply to alienation by act of parties: *In re Harvey ex parte Pisleley* (1889), 6 Mor. 95. See in the case of a lease subject to re-entry by lessor in case of alienation: *Doe v. Bevan* (1815), 3 M. & S. 353; cf. *In re Birbeck* (1913), 2 Ch. 34.

<sup>1</sup> *In re Detmold* (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; *Ex parte Matthews and Wilkinson in re Johnson* (1904), 1 K. B. 134; 73 L. J. K. B. 220; 11 Mans. 14.

<sup>2</sup> *In re Burroughs-Fowler* (1916), 2 Ch. 251; 85 L. J. Ch. 550; 2 H. B. R. 108.

<sup>3</sup> *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19.



**Section 25** chattels in the event of the bankruptcy of the builder\*. There is nothing obnoxious to the bankruptcy law in articles which *bona fide* provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and which is not shown to be less than the fair price which might otherwise be obtained<sup>5</sup>.

While a man may not make his property subject to a gift over on his bankruptcy, he may transfer property to or for the use of another qualifying the interest of his alienee by a condition to take effect on bankruptcy<sup>6</sup>, and where funds have been mixed it may be shown which are the funds of the third party. Thus where a post-nuptial settlement was made by husband and wife of property of each of them to the husband for life with a gift over to the wife on bankruptcy or alienation, it was held that the settlement was good as against the trustee in bankruptcy of the husband to the extent of the property of the wife included in the settlement<sup>7</sup>.

Where a life interest in a trust fund is to determine on the happening of any event whereby the income would, if belonging absolutely to the tenant for life, "become payable to some other person," the life interest determines if a receiving order is made against the tenant for life, at least where any income comes into the hands of the trustee before the receiving order is discharged<sup>8</sup>. The date from which the trustee is entitled to any dividend which vests in him is the date of

\* *In re Waugh ex parte Dickin* (1880), 4 Ch. D. 524; 46 L. J. Bank. 26; as explained in *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19; and see as to a case when property is forfeited "as and for liquidated damages": *Ex parte Newitt in re Garrud* (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; *Climpson v. Coles* (1889), 23 Q. B. D. 465; 58 L. J. Q. B. 346; *Church v. Sage* (1892), 67 L. T. 800; 41 W. R. 175.

<sup>5</sup> *Borland's Trustee v. Steel* (1901), 1 Ch. 279; 70 L. J. Ch. 51.

<sup>6</sup> *Wilson v. Greenwood* (1818), 18 Swans, 471, 481.

<sup>7</sup> *McIntosh v. Pogose* (1895), 1 Ch. 505; 64 L. J. Ch. 275; 2 Mans. 27; *Lockyer v. Savage* (1733), 2 Str. 947; *Lester v. Garland* (1832), 5 Sim. 205; *Montefiore v. Behrens* (1866), L. R. 1 Eq. 171; *Ex parte and in re Eyre* (1881), 44 L. T. 922; *Denny v. Denny & Warr* (1919), 1 K. B. 583.

<sup>8</sup> *In re Laye* (1913), 1 Ch. 298; 82 L. J. Ch. 218; 20 Mans. 124; *In re Sartoris' Estate* (1892), 1 Ch. 11; 61 L. J. Ch. 1; as to the effect of the presentation of a bankruptcy petition in a somewhat similar case, see *In re Amherst's Trusts* (1872), L. R. 13 Eq. 464; 41 L. J. Ch. 222; *Ex parte Dawes in re Moon* (1886), 17 Q. B. D. 275; 3 Mor. 105.



the commencement of the title of the trustee<sup>9</sup>. A somewhat liberal rule of construction has been adopted when interpreting clauses in wills and settlements<sup>10</sup> whereby income or the proceeds of property bequeathed to or settled on a person is subject to a gift over in bankruptcy or such like event. Although a receiving order or adjudication may have been made, there will be no forfeiture if the bankruptcy is annulled before any income becomes payable<sup>1</sup>; nor will there be a forfeiture where there is a right to have the adjudication annulled<sup>2</sup>. But if the income becomes payable before annulment the forfeiture will take effect<sup>3</sup>.

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Where, on bankruptcy occurring, the income from a fund becomes vested in trustees with a discretion to pay over such portion as they see fit to the bankrupt, and they pay him more than enough for his maintenance, he may be made to account for the excess to his trustee in bankruptcy<sup>4</sup>.

(1) Rights of trustee on defeasance.

Where the bankrupt is entitled to a defeasible interest, this interest passes to the trustee subject to be defeated in the manner contemplated in the instrument creating that interest. Thus where funds were subject to a power of appointment exercisable by the father of the bankrupt, and in default of appointment were limited to the bankrupt, and after the bankrupt obtained his certificate his father appointed the funds to him, it was held that during the bankruptcy and before the certificate all that the trustee had was a

(2) Trustee takes what bankrupt entitled to; contingent interests.

<sup>9</sup> *Montefiore v. Guedalla* (1901), 1 Ch. 435; 70 L. J. Ch. 435; 8 Mans. 126; note that under the Canadian Act the making of a receiving order has the same effect as an adjudication in England; see section 6(3).

<sup>10</sup> Distinguish *West v. Williams* (1899), 1 Ch. 132, at 148; 68 L. J. Ch. 127.

<sup>1</sup> *White v. Chitty* (1865) L. R. 1 Eq. 372, 375, 376; 35 L. J. Ch. 343; *Samuel v. Samuel* (1879), 12 Ch. D. 152; 47 L. J. Ch. 716; *Lloyd v. Lloyd* (1866), L. R. 2 Eq. 722.

<sup>2</sup> *Metcalf v. Metcalfe*, 43 Ch. D. 633.

<sup>3</sup> *In re Parnham's Trusts* (1872), L. R. 13 Eq. 413; *Robertson v. Richardson* (1885), 30 Ch. D. 623; 55 L. J. Ch. 275; see further *In re Loftus-Otway* (1895), 2 Ch. 235; 64 L. J. Ch. 529, where the cases are discussed; and consider the case of a gift subject to a condition precedent: *Cox v. Fonblanque*, L. R. 6 Eq. 482; 37 L. J. Ch. 622.

<sup>4</sup> *Re Ashby ex parte Wreyford* (1892), 1 Q. B. 872; 9 Mor. 77.



**Section 25** defeasible title; and that under the power of appointment executed after the date of the certificate the trustee's title was defeated the bankrupt became entitled in a new right to the whole fund as against the trustee<sup>b</sup>. This principle is subject to the limitation that after the bankruptcy the bankrupt himself may not by his own act defeat or intercept any right which had once been vested in his trustee<sup>c</sup>.

A gift of property to trustees on trust to pay the income in a certain way during the life of a bankrupt, but should he at any time obtain his certificate then the income to be paid to him, is a contingent interest which vests in the trustee of the bankrupt<sup>d</sup>. Such cases must be distinguished from a mere chance of benefit in property in which the debtor has no interest such as the chance of receiving a legacy from a relative<sup>e</sup>, or a contingent interest under a policy of life insurance<sup>f</sup>.

A bequest of income of property to a bankrupt payable at the sole discretion of trustees, provided that if the bankrupt obtain his discharge the income is to belong to him for his own absolute use and benefit, is a contingent interest which passes to his trustee in bankruptcy. The law will not allow property to be so given to a man as to put him with reference to it in the position of a *femme covert* entitled to property for separate use without power of anticipation<sup>g</sup>.

D.  
Rights of  
action which  
do not pass  
to trustee.

Certain rights of action do not pass to the trustee. The general rule covering rights of action founded both in contract and tort is that a cause of action which touches only the person of the bankrupt does not pass to the trustee; but that if it touches his estate

<sup>b</sup> *Lee v. Olding* (1856), 2 Jur. N. S. 850; *In re Vizard's Trusts* (1866), L. R. 1 Ch. 588; 35 L. J. Ch. 804; 14 W. R. 1000.

<sup>c</sup> *Hole v. Escott* (1838), 4 My. & C. 187.

<sup>d</sup> *Davidson v. Chalmers* (1864), 33 L. J. Ch. 622; 12 W. R. 592; and see as to a possibility coupled with an interest: *In re Jones* (1868), 4 U. C. P. R. 317, 321, 324, and compare: *Gray v. Hatch* (1871), 18 Gr. 72.

<sup>e</sup> *Johnson v. Smiley* (1853), 17 Beav. 223, 230; *In re Inkson's Trusts* (1855), 21 Beav. 310; *In re Vizard's Trusts* (1866), L. R. 1 Ch. 588; *In re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51.

<sup>f</sup> *Ex parte Dever in re Suse and Sibeth* (1887), 18 Q. B. D. 660; 56 L. J. Q. B. 552.

<sup>g</sup> *Davidson v. Chalmers* (1864), 10 L. T. (N.S.) 217.



it does pass. The question is fully treated in the discussion of what property passes to the trustee. Section 25

Property of the bankrupt acquired after the making of the receiving order vests in the trustee in a qualified sense until he intervenes, when it vests indefeasibly in him<sup>1</sup>. E.  
After-acquired property passes to trustee in a qualified sense

It may be that there are funds or property in the possession of the debtor or his trustee which the court will order the trustee as one of its officers to return to the person from whom it was obtained, and this although that person might have been unable by any action at law or in equity to recover the property. In these cases the court will not allow its officer to insist on a rule of law or of equity in the administration of an estate where such insistence would produce an unjust and dishonest result; or where to take advantage of that rule would be inconsistent with natural justice and that which an honest man would do<sup>2</sup>, but where there is no moral obligation on the trustee to allow the claim, he will not be ordered to do so<sup>3</sup>. F.  
Court may order trustee to return property.

We turn now to a consideration of the property which vests in the trustee. Subject to the exceptions already noted, and to such exceptions as are set out in the further notes to this section all the property of V. Property vesting in trustee for division among creditors.

<sup>1</sup> See notes to this section: *infra*, p. 312, under the heading "After Acquired Property", and section 34(1).

<sup>2</sup> *In re Thelluson ex parte Abdy* (1919), 2 K. B. 735; 88 L. J. K. B. 1210; (1918-19) B. & C. R. 249; (moneys paid to the debtor without knowledge of an act of bankruptcy after a receiving order had been made); *Ex parte James in re Condon* (1874), L. R. 9 Ch. 609; 43 L. J. Bank. 107 (voluntary payment by execution creditor to trustee); *In re Rivett-Carnac ex parte Simmonds* (1885), 16 Q. B. D. 308; 55 L. J. Q. B. 74 (payments to trustee by trustees of a settlement); *In re and ex parte Rhoades* (1899), 2 Q. B. 347; 68 L. J. Q. B. 804 (money paid to the trustee by an executor in ignorance of a right of retainer), *In re Tyler ex parte O. R.* (1907), 1 K. B. 865; 76 L. J. K. B. 541; (payments by wife of bankrupt with knowledge of trustee of premiums due on policy of assurance on life of bankrupt), *In re Bell ex parte Debtor* (1908), 99 L. T. 939 (moneys which the debtor conscientiously considered he held as trustee for others).

<sup>3</sup> *In re Hall ex parte O. R.* (1907), 1 K. B. 875; 76 L. J. K. B. 546 (payments made to creditors by mortgagees with notice of an act of bankruptcy); *Tapster v. Ward* (1909), 101 L. T. 25, 503 (payments by the debtor made without the knowledge of the trustee on a life assurance policy, which formed part of his estate in bankruptcy), *In re Phillips* (1914), 2 K. B. 689; 83 L. J. K. B. 1364 (similar to *Tapster v. Ward*); *In re Stokes ex parte Mellish* (1919), 2 K. B. 256; 88 L. J. K. B. 794; (1918-19) B. & C. R. 208 (a similar case).



**Section 25** the bankrupt vests in the trustee as the legal representative of the debtor<sup>4</sup>; but he takes it subject to all the rights and equities to which it was subject while held by the debtor<sup>5</sup>, provided those rights and equities are not contrary to the policy or special enactments of the bankruptcy law and are not over-reached by the relation back of his title<sup>6</sup>.

A.  
Property of  
debtor at  
date of pre-  
sentation of  
any petition.

The property vesting in the trustee of a bankrupt is apparently all such property as may belong to or be vested in the debtor at the date of the presentation of the petition<sup>7</sup> on which the receiving order is made<sup>8</sup>. The words "at the date of the presentation of *any* petition" are no doubt capable of a wider construction, but it is suggested that the interpretation given above is the most probable one. The relation back of the title of the trustee (as distinguished from the relation back of the bankruptcy of the debtor) is not so extensive as that under the English Act<sup>9</sup>. There is no relation back in the case of an authorized assignment. Form 18 gives the form of assignment for the general benefit of creditors. There is no provision in the form for a schedule of the property which is to pass by the assignment.

The object of the bankruptcy law is that everything

<sup>4</sup> *In re Mapleback ex parte Caldecott* (1876), 4 Ch. D. 150; 13 Cox. 374.

<sup>5</sup> *In re Clarke ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 706; 1 Mans. 207.

<sup>6</sup> See Chapter VI.

<sup>7</sup> Note the curious expression "the date of the petition" in sections 29(2) and 30.

<sup>8</sup> See notes to sections 6(3) and 4(10). Rule 76 says: "The petition is deemed to have been presented to the court on the day of the filing thereof." See, however, notes to that Rule.

<sup>9</sup> Section 38(a) of the English Act reads "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge", and section 37(1) of the same Act says: "The bankruptcy of a debtor whether it takes place on the debtor's own petition or upon that of a creditor or creditor's, shall be deemed to have relation back to and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition".



belonging to the bankrupt which can be turned to profit shall pass to the trustee for the benefit of creditors<sup>1</sup>. Section 25

There is old case law to the effect that property of the debtor beyond the reach of the insolvent laws such as property in the United States, will not pass to the trustee<sup>2</sup>; but the present Act gives a much more extensive definition to property than former Acts<sup>3</sup>, though what effect will be given by foreign courts to this enactment has yet to be determined. While "property" is defined by section 2(*dd*), the question of what is or what is deemed to be the property of the debtor will, in many respects, depend on provincial laws<sup>4</sup>.

Subject to the provisions of the Act with respect to settlements, and marriage contracts<sup>5</sup>, and to the rule in bankruptcy law that the trustee takes subject to the same equities as the bankrupt<sup>6</sup>, provincial law will have to be resorted to to ascertain the property and rights<sup>7</sup> of married women whose husbands become

<sup>1</sup> Per Buller, J., in *Smith v. Coffin* (1795), 2 H. Bl. 444, a case on the question whether a right of action founded on a writ of entry *fur abatement* passed to the assignee..

<sup>2</sup> *Roe v. Smith*, 15 Gr. 344.

<sup>3</sup> See section 2(*dd*), where cases are collected.

<sup>4</sup> See per Patterson, J., in *In re Barrett* (1880), 5 O. A. R. 206. See e.g. *The Conditional Sales Act of Ontario*, R. S. O. 1914, c. 136, s. 2 of which gives the consequences of non-compliance with the Act. Section 2(3) reads: "where the delivery is made to a trader or other person for the purpose of resale by him in the course of business such provision shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with."

Distinguish where there has been no hiring or conditional sale: *Langley v. Kahnert* (1905), 36 S. C. R. 397. Note that there is no "reputed ownership" clause in *The Bankruptcy Act* such as appears in section 38(2)(c) of the English Act, nor has the doctrine of reputed ownership been imported into *The Companies Winding-up Act*: *Gorringe v. Irwell India Rubber Works* (1886), 34 Ch. D. 128; 56 L. J. Ch. 85; *In re Crumlin Viaduct Works Co.* (1879), 11 Ch. D. 755; 48 L. J. Ch. 537. It is conceivable that this matter could be dealt with by a Provincial Act. See further as to the effect of local law: *White Star Hotel v. Turgeon* (1915), 17 Que. P. R. 299; *In re Hart & Ontario Express & Transportation Co.* (1892), 22 O. R. 510.

<sup>5</sup> See section 29 and *Murray v. Elibank* (1804), 10 Ves. 90; *White and Tudor*, Vol. 1, p. 654.

<sup>6</sup> *Ex parte Thompson* (1835), 1 Dea. 90, and notes to section 6(3) and 10.

<sup>7</sup> See as to dower: *Standard Realty v. Nicholson* (1911), 24 O. L. R. 46; *Pratt v. Bunnell* (1891), 21 O. R. 1; *Casner v. Haight* (1884), 6 O. R. 451; *Blong v. Fitzgerald* (1893), 15 P. R. 467; *Gemmell v. Nelli-*



Section 25 bankrupt<sup>a</sup>. While what is meant by "property" in the Act is treated in the notes to section 2(*dd*), there are certain questions connected with the consideration of what property vests in the trustee which can more conveniently be discussed in the notes to this section. These questions cover:

- (a) Rights of action which do and do not pass to the trustee.
- (b) Contracts with the debtor.
- (c) Shares.
- (d) Alleged gifts.
- (e) Miscellaneous matters.

(1) Rights of action which do and do not pass to the trustee.

Not all rights of action pass to the trustee. The general rule covering rights of action founded both in contract and in tort is that a cause of action which touches only the person of the bankrupt does not pass to the trustee; but that if it touches his estate it does pass<sup>9</sup>, and the bankrupt may not generally sue in his own name with respect to such a right of action unless it has been acquired by him since the bankruptcy<sup>10</sup>. "The statute transfers not all rights of action which

*gan* (1895), 26 O. R. 307; *In re Music Hall Block, Dumble v. McIntosh* (1885), 8 O. R. 225; *In re Luckardt* (1898), 29 O. R. 111; *Gardner v. Brown* (1890), 19 O. R. 202.

<sup>a</sup> See *Ex parte Whitehead* (1885), 14 Q. B. D. 419; 54 L. J. Q. B. 240; 54 S. J. 360; 17 Mans. 125; *In re Jamieson ex parte Pannell* (1889), 6 Mor. 24.

<sup>9</sup> *Beckham v. Drake* (1849), 2 H. L. C. 579, and see *Stanton v. Collier* (1853), 23 L. J. Q. B. 116. The bankrupt has no right to sue on matters in which his interest has become vested in his trustee: *Boaler v. Power* (1910), 2 K. B. 229; 79 L. J. K. B. 486; *Jones v. Des Brisay*, Trin. T. 1871, *Stevens' Digest* N. B. R. 413; but see *Dunn v. Irwin* (1875), 25 U. C. C. P. 111, or in respect of which the Court of Bankruptcy has jurisdiction: *Motion v. Moojen* (1872), L. R. 14 Eq. 202; 41 L. J. Ch. 596, without leave of the court: *Payne v. Dicker* (1871), 24 L. T. 492. A bankrupt cannot bring an action for maintenance on the ground that the defendant incited and supported the bankruptcy proceedings: *Metropolitan Bank v. Pooley* (1885), 10 A. C. 210; 54 L. J. Q. B. 449. Nor can a person who has been declared a bankrupt bring an action while his adjudication remains in force to set aside on the ground of fraud the judgment of the petitioning creditor on which the adjudication was made: *Boaler v. Power*, *supra*, nor can he bring an action for maliciously procuring the bankruptcy: *Metropolitan Bank, supra*. But a bankrupt may sue with respect to goods acquired by him since his bankruptcy: *Webb v. Fox* (1797), 7 T. R. 391; and see *Fowler v. Down* (1797), 1 B. & P. 44.

<sup>10</sup> See section 34: *Emden v. Carte* (1881), 17 Ch. D. 169; 51 L. J. Ch. 41; *Webb v. Fox, supra*; *Fowler v. Down, supra*; *Graham v. McKernan* (1877), 42 U. C. Q. B. 368; *Ball v. Tennant* (1894), 21 O. A. R. 602.



would pass to executors . . . but all such as would be assets in their hands for the payment of debts, and no others,—all which could be turned to profit . . . Rights of action for torts which would die with the testator . . . and all actions of contract affecting the person only would not pass”<sup>1</sup>. Section 25

In considering what rights of action pass to the trustee and what remain in the bankrupt, it will be convenient first to discuss the cases dealing with rights of action founded in contract, then with those originating in tort. Rights of action for the breach of such contracts as directly affect the personal estate whereby the trustee is prevented from receiving part of it, or its value is diminished, are transferred to the trustee<sup>2</sup>. Thus the right to bring an action for a declaration that a conveyance purporting to be a conveyance absolute was a mortgage passes to the trustee<sup>3</sup>, as does the right to sue on a covenant for indemnity in an assigned lease<sup>4</sup>; and the right to be indemnified by his *cestui que trust*<sup>5</sup>; the right of a lessee to be relieved from a forfeiture of a lease<sup>6</sup>; and rights under a purchase agreement whereby an assignment is to be executed when the whole of the instalments shall have been paid<sup>7</sup>. On the other hand, actions for breach of contract personal to the bankrupt unaccompanied by an injury to the personal estate, as a contract to carry him in safety, or to cure his person of a wound or disease, or a contract to marry are not transferred<sup>8</sup>. (a)  
Rights of  
action  
founded in  
contract.

<sup>1</sup> *Per Parke, B., in Beckham v. Drake, supra*, at 627; and see *Hancock v. Caffyn* (1832), 8 Bing. 358, 366; 1 M. & Scott 521.

<sup>2</sup> *Per Parke, B., in Beckham v. Drake* (1849), 2 H. L. C. 579, 626; 13 Jur. 921.

<sup>3</sup> *See v. Lawson* (1880), L. R. 15 Ch. D. 426; 49 L. J. Bank. 69; and *semble*, a *bona fide* sale of this right by the trustee is not impeachable on the ground of maintenance or champerty: *s.c. Guy v. Churchill* (1888), L. R. 40 Ch. D. 481.

<sup>4</sup> *In re Perkins, Poyser v. Beyfus* (1898), 2 Ch. 182; 67 L. J. Ch. 454; 5 Mans. 193.

<sup>5</sup> *In re Richardson ex parte The Governors of St. Thomas' Hospital* (1911), 2 K. B. 705; 80 L. J. K. B. 1232; 18 Mans. 227; *cf. In re Law Guarantee Society* (1914), 2 Ch. 617; 84 L. J. Ch. 1; and *Jennings v. Mather* (1902), 1 K. B. 1; 70 L. J. K. B. 1032; 8 Mans. 329.

<sup>6</sup> *Howard v. Fanshawe* (1895), 2 Ch. 589.

<sup>7</sup> *Turner v. Hardcastle* (1862), 11 C. B. N. S. 683; 31 L. J. C. P. 193.

<sup>8</sup> *Per Parke, B., in Beckham v. Drake, supra*, at 627.



## Section 25

(i).  
Contracts  
*in fieri* for  
personal  
services.

A contract *in fieri* and unexecuted for the personal services of the bankrupt is incapable of assignment and will not vest in the trustee on the bankruptcy occurring<sup>9</sup>, though the trustee may intervene and claim the fruits of the litigation<sup>10</sup>.

(ii)  
Personal  
earnings of  
bankrupt.

The right of the trustee to intervene and claim the fruits of the litigation is subject to the general rule that the bankrupt is entitled to his personal earnings to the extent necessary to support himself and family<sup>1</sup>. Whether the right of the trustee is a right in the Bankruptcy Court to have so much of the money as is not required for the bankrupt's livelihood appropriated to him by order of the Bankruptcy Court, or whether the trustee has a right to bring an action in his own name to recover the money *quære*<sup>2</sup>.

(b)  
Rights of  
action  
founded in  
tort.

Turning now to rights of action founded in tort, it is clear that some actions for torts do pass. Thus actions for damage to personal chattels, whereby they are directly affected, and are prevented from coming into the hands of the assignee, or come diminished in value, pass. An action of trover for conversion before bankruptcy is an example of this<sup>3</sup>. On the other hand, rights of action for injuries to the person, or

<sup>9</sup> *Baily v. Thurston & Co.* (1903), 1 K. B. 137; 72 L. J. K. B. 36; 10 Mans. 1; explaining *Emden v. Carte* (1881), 17 Ch. D. 169, 768; 50 L. J. Ch. 492; *Wadling v. Oliphant*, 1 Q. B. D. 145; 45 L. J. Bank. 837, and see *Jameson v. Brick Stone Co.* (1878), 4 Q. B. D. 208; 48 L. J. Q. B. 249. The property of the debtor vesting in the trustee and divisible among the creditors does not include the unearned proceeds of the personal skill and knowledge of the debtor, so as to empower the court to set aside for the benefit of the creditors a portion of these earnings: *Ex parte Benwell in re Hutton* (1884), 14 Q. B. D. 301; 54 L. J. Q. B. 53; *In re Rogers ex parte Collins* (1894), 1 Q. B. 425; 63 L. J. Q. B. 178; 1 Mans. 387.

<sup>10</sup> *Wadling v. Oliphant*, *supra*; *Emden v. Carte* (1881), 17 Ch. D. 169, 768; 50 L. J. Ch. 472, as explained in *Baily v. Thurston*, *supra*.

<sup>1</sup> *Affleck v. Hammond* (1912), 3 K. B. 162; 81 L. J. K. B. 565; 19 Mans. 111; *In re Roberts* (1900) 1 Q. B. 122; 69 L. J. Q. B. 19; 16 T. L. R. 29; 7 Mans. 5; *Bailey v. Thurston* (1903), 1 K. B. 137; 72 L. J. K. B. 36; 10 Mans. 1; *Ex parte Vine in re Wilson* (1878), 8 Ch. D. 364; 47 L. J. Bank. 116; *Ex parte Collins in re Rogers* (1894), 1 Q. B. 425; 63 L. J. Q. B. 178; 1 Mans. 387. See further as to "personal earnings" notes respecting after-acquired property. *infra*, p. 312.

<sup>4</sup> See *per* Vaughan-Williams, L.J., in *Affleck v. Hammond*, *supra*, and see *Silk v. Osborn* (1794), 1 Esp. 140; *Crofton v. Poole* (1830), 1 B. & Ad. 568.

<sup>5</sup> *Per* Parke, B., in *Beckham v. Drake* (1849), 2 H. L. C. 579, 626; 13 Jur. 921.



reputation, or to the possession of real estate, do not pass. Actions for assault, for example, for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quære clausum fregit*<sup>6</sup>, actions for criminal conversation with the wife<sup>7</sup>, or for seduction<sup>8</sup>, do not pass to the assignee even though some of these causes of action may be followed by a consequential diminution of the personal estate<sup>9</sup>. Damages recovered by an undischarged bankrupt in an action for a personal tort do not pass to his trustee, and the trustee cannot intercept them before they reach the bankrupt's hands or prevent him from spending them in the maintenance of himself and his family; though if the bankrupt had accumulated the money and invested it in some property, that property might be reached by the trustee<sup>10</sup>.

There is no decision on what Collins, L.J.<sup>1</sup>, calls the vexed question as to whether a cause of action can be divided leaving one part to be sued on by the bankrupt, the other by the trustee, as where one and the same cause of action results in substantial damage to the property of the bankrupt as well as injury to his person or annoyance to his feelings. Lord Campbell expressed the opinion in *Rogers v. Spence*<sup>2</sup> that it may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him and will also give an action to the assignees for the injury which has been done to the property<sup>3</sup>. It has,

(c)  
Whether a  
cause of  
action may  
be split.

<sup>6</sup> *Rogers v. Spence* (1844), 13 M. & W. 571; 12 Cl. & F. 700.

<sup>7</sup> Or for slander, and for enticing away and detaining the wife: *White v. Elliott* (1870), 30 U. C. Q. B. 253.

<sup>8</sup> *Howard v. Crowther* (1841), 8 M. & W. 601; 5 Jur. 914.

<sup>9</sup> Per Parke B., *Beckham v. Drake*, *supra*, at 626; *Rogers v. Spence* (1844), 13 M. & W. 571; 581; 12 Cl. & F. 700; *Smith v. Commercial Union* (1873), 33 U. C. Q. B. 529. As to negligence of a solicitor in defending an action, see *Wetherell v. Julius* (1850), 19 L. J. C. P. 367; and contrast: *Kellaway v. Bury* (1892), 66 L. T. 599.

<sup>10</sup> *Ex parte Vine in re Wilson* (1878), 8 Ch. D. 364; 47 L. J. Bank. 116.

<sup>1</sup> In *Rose v. Buckett* (1901), 2 K. B. 449, at 455; 70 L. J. K. B. 736; 8 Man. 259.

<sup>2</sup> (1846), 12 Cl. & F. 700, 720.

<sup>3</sup> See also per Parke, B., in *Beckham v. Drake* (1847), 2 H. L. C. 579, 629. As to cases where special or vindictive damages are recoverable, see per Collins, L.J., in *Rose v. Buckett*, *supra*, commenting on *Brewer in re Drew* (1843), 11 M. & W. 625; 12 L. J. Ex. 448, and cf.



**Section 25** however, been decided that where the damages to property by trespass and conversion are merely nominal, the cause of action in respect thereof is not regarded as one affecting the value of the property passing to the trustee so as to give him a right of action in respect thereof, but rather as a wrong personal to the bankrupt himself<sup>4</sup>. But where two causes of action, totally distinct, arise out of the same contract, and the debtor before bankruptcy assigns his right under one of them, and his bankruptcy vests in his trustee the right to sue under the other, the bankrupt himself may sue as trustee for his transferee on the first cause of action<sup>5</sup>.

(d)  
Person suing  
on behalf of  
himself and  
other  
creditors.

It should be noted that a person who sues on behalf of himself and all other creditors and is adjudicated bankrupt during the litigation becomes incapable of conducting the action; and *semble*, the action will be dismissed unless the trustee obtains an order to carry on the proceedings<sup>6</sup>.

(e)  
Practice as  
regards  
plaintiffs and  
defendants.

The practice with respect to actions already instituted in which the bankrupt is a plaintiff or defendant will vary in each province. For the convenience of the profession in the absence of decisions under the Act, the English practice is given. It is based on Order 17, Rules 1 to 4 inclusive<sup>7</sup>.

*Hodgson v. Sidney* (1866), L. R. 1 Ex. 313; 35 L. J. Ex. 182, and *Morgan v. Stebble* (1872), L. R. 7 Q. B. 611; 47 L. J. Q. B. 280. It is clear that two causes of action may arise from the same wrongful act. In a case where the plaintiff received bodily injuries, and at the same time the plaintiff's cab was injured, it was held that the plaintiff who had recovered judgment in the county court for damage to his cab could sue in the high court claiming damages for personal injury: *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476.

<sup>4</sup> *Rose v. Buckett*, *supra*.

<sup>5</sup> *Boddington v. Castelli* (1853), 1 E. & B. 879; 23 L. J. Q. B. 31.

<sup>6</sup> *Wolff v. Van Boelen* (1906), 94 L. T. 502.

<sup>7</sup> Order 17, Rules 1-4 reads: "Order 17, Rule 1.—A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue and shall not become defective by the assignment, creation or devolution of any estate or title, *pendente lite*; and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death. Rule 2.—In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest of any of such



Where a plaintiff becomes bankrupt and the right of action does not pass to the trustee<sup>8</sup>, the bankrupt can continue the action without joining the trustee<sup>9</sup>. Where the right of action vests in the trustee the action does not abate if the cause of action continues<sup>10</sup>, but the bankrupt cannot continue the action in his own name<sup>11</sup> unless the trustee re-assigns the cause of action to him<sup>1</sup>. Thus where a plaintiff suing on behalf of himself and all other creditors becomes a bankrupt the action will be dismissed unless his trustee intervenes, for the plaintiff can only sue as a creditor, which he ceases to be by the assignment by operation of law to his trustee<sup>2</sup>. Where the plaintiff is adjudicated bankrupt after action brought and his trustee declines to proceed with the action it may be stayed and possibly dismissed<sup>3</sup>. If it is stayed the

Section 25

(i)  
Plaintiff  
becoming  
bankrupt.

party be made a party, or be served with notice in such manner and form as hereinafter prescribed and on such terms as the court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just. Rule 3.—In case of an assignment, creation or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved. Rule 4.—Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the court or a judge, upon an allegation of such change or transmission of interest or liability, or of any such person interested having come into existence. Some recent decisions under *The Bankruptcy Act* are noted under section 20(1) (c).

<sup>8</sup> See notes to this section under heading Rights of Action.

<sup>9</sup> *Rose v. Buckett* (1901), 2 K. B. 449; 70 L. J. K. B. 736; 17 T. L. R. 544; 8 Mans. 259; *Low v. G. E. Ry. Co.* (1908), 1 K. B. 195; *Affleck v. Hammond* (1912), 3 K. B. 162; 81 L. J. K. B. 565; 19 Mans. 111.

<sup>10</sup> Order 17, Rule 1; *Barker v. Johnson* (1889), 60 L. T. 64.

<sup>11</sup> *Jackson v. N. E. Rly. Co.* (1877), 5 Ch. 844; 46 L. J. Ch. 723; though he may get leave to continue in the name of the trustee: *In re Whatman* (1889), W. N. 213.

<sup>1</sup> *Barker v. Johnson* (1889), 60 L. T. 64.

<sup>2</sup> *Wolff v. Van Boven* (1906), 94 L. T. 502.

<sup>3</sup> *Warder v. Saunders* (1882), 10 Q. B. D. 114; *Barker v. Johnson*, *supra*, at 65. The former practice in Ontario in case of abatement of an action by reason of the bankruptcy of the sole plaintiff was for a defendant who wished to get rid of the suit to serve the plaintiff assignee with notice of motion for an order that he do within a time to be limited prefer supplemental proceedings for the purpose of prosecuting the suit, and in default, that the action be dismissed: *Cameron v. Eager* (1873), 6 P. R. 117.



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trustee may not in the absence of special circumstances have the stay removed; nor is the plaintiff after his discharge and after the purchase of the right of action from the trustee entitled in the absence of special circumstances to a removal of the stay<sup>4</sup>. If after he has got leave to continue the action a trustee is removed and a new one appointed, the latter must, if he wishes to continue the action, get leave to do so even though the action is in the official name of the trustee<sup>5</sup>. The trustee may decline to prosecute the action and, if so, he cannot be added as defendant against his will<sup>6</sup>. It seems that the trustee may get leave to issue execution on a judgment obtained by the bankrupt without getting himself formally made a party to the action<sup>7</sup>. If the liquidator of a company which is being wound up continues an action initiated by the company before the commencement of the winding-up and the action is dismissed with costs, the defendant is entitled to all his costs in full to be paid out of the estate and not merely the costs as from the commencement of the winding-up with liberty to prove for the costs previously incurred<sup>8</sup>.

(ii)  
Defendant  
becoming  
bankrupt.

Where a defendant becomes bankrupt and the cause of action is a debt provable in the bankruptcy,<sup>9</sup> the plaintiff will usually not be permitted to continue the action<sup>10</sup>; nor will the trustee be made a defendant. The plaintiff should resort to the Court of Bankruptcy in order to establish his case against the bankrupt's estate;<sup>1</sup> but where some relief may be obtained against the trustee he can be joined<sup>2</sup>, as in actions which are allowed to proceed<sup>3</sup>. In actions against two or more defendants, one of whom becomes bankrupt, his trustee

<sup>4</sup> *Selig v. Lion* (1891), 1 Q. B. 513; 60 L. J. Q. B. 403.

<sup>5</sup> *Pooley's Trustee v. Whetham* (1884), 28 Ch. D. 38; 54 L. J. Ch. 182.

<sup>6</sup> *Farnham v. Milward & Co.* (1895), 2 Ch. D. 730; 64 L. J. Ch. 816.

<sup>7</sup> *In re Bagley* (1911), 1 K. B. 317, 325; 80 L. J. K. B. 168; 55 Sol. J. 48; 18 Man. 1.

<sup>8</sup> *In re London Drapery Stores* (1898), 2 Ch. 684.

<sup>9</sup> See section 44.

<sup>10</sup> See Section 7(2).

<sup>1</sup> *Barter v. Dubeux* (1881), 7 Q. B. D. 413; 50 L. J. Q. B. 527, and see *Hutchins v. Cohen* (1870), 15 L. C. J. 235.

<sup>2</sup> *Hale v. Boustead* (1881), 8 Q. B. D. 453; 51 L. J. Q. B. 255; *Greenwood v. Humber* (1898), 6 Mans. 42.

<sup>3</sup> *Sharp v. McHenry* (1886), 55 L. T. 747.



may be made a party<sup>4</sup>. In such a case judgment will not usually be against the trustee; or that he pay out of the estate; but judgment will be against the other defendant with liberty to the plaintiff to prove in the bankruptcy for the amount of the established claim<sup>5</sup>. Although in the case of a joint claim the plaintiff may be compelled to join the trustee of the bankrupt defendant, he cannot be compelled to do so in the case of a several claim, but may proceed with the action against the other defendant or defendants<sup>6</sup>. Actions in respect of debts or claims not provable in bankruptcy or as to which the discharge in bankruptcy would be no release will not be stayed, and such actions may be continued against the bankrupt personally, even though the trustee has been made a party to the suit<sup>7</sup>.

The rights of the trustee and others with respect to contracts into which the bankrupt had entered should be noticed. Section 25

A contract is not necessarily put an end to by the bankruptcy or insolvency of one party<sup>8</sup>. But when bankruptcy occurs the rights of the trustee are not in all respects the same as those of the debtor before his bankruptcy or insolvency. Where the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with possession of the goods, the trustee in bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. If he does not do so the vendor is entitled to treat the contract as broken, and to resell the goods without first tendering them to the trustee<sup>9</sup>. *Semble* a sub-purchaser from the bankrupt is entitled to an option to complete the original contract on tendering the agreed price in cash within a reasonable time<sup>10</sup>.

<sup>4</sup> *Barter v. Dubeux*, *supra*.

<sup>5</sup> *Barter v. Dubeux*, *supra*, at 417.

<sup>6</sup> *Lloyd v. Dimmack* (1877), 7 Ch. D. 398; 47 L. J. Ch. 398.

<sup>7</sup> *Ex parte Coker in re Blake* (1875), L. R. 10 Ch. 652; 44 L. J. Bank. 126.

<sup>8</sup> *Gibson v. Carruthers* (1841), 8 M. & W. 321; *Lawrence v. Knowles* (1839), 5 Bing. N. C. 399; *Tolkurst v. Associated Portland Cement Mfgs.* (1902), 2 K. B. 660; 71 L. J. K. B. 949; *William Hamilton Mfg. Co. v. Hamilton Steel & Iron Co.* (1910), 23 O. L. R. 270.

<sup>9</sup> *Ex parte Stapleton in re Nathan* (1879), L. R. 10 Ch. D. 586.

<sup>10</sup> *Ex parte Stapleton in re Nathan*, *supra*.



**Section 25** On bankruptcy or insolvency occurring the unpaid vendor, even where he has contracted to sell on credit, may exercise his right of *stoppage in transitu*, and may hold the goods until paid or tendered the price<sup>1</sup>. If after the transitus is at an end and the goods are in the possession of the debtor, he returns them to the vendors this may amount to a fraudulent preference<sup>2</sup>. Although the transitus may be at an end the property does not, without such an acceptance as will satisfy the Statute of Frauds, legally vest in the consignee where there is no binding contract between the vendor and vendee<sup>3</sup>.

The trustee has not, in the absence of a definite clause in the contract to that effect, a right himself to complete a contract which involves the personal skill of the bankrupt<sup>4</sup>.

Where a contract for the sale of goods has been induced by the fraud of the purchaser the vendors are entitled to disaffirm the contract and resume possession of the goods notwithstanding the making of a receiving order; for the title of the trustee in bankruptcy is subject to the rights of third parties<sup>5</sup>.

<sup>1</sup> *Biddlecombe v. Bond*, 4 A. & E. 332; *Blosam v. Sanders* (1825), 4 B. & C. 949; *Ex parte Francis in re Bruno, Silva & Co.* (1887), 57 L. T. 577; 4 Mor. 146; *Ex parte Hughes in re Gurney* (1892), 67 L. T. 598; 9 Mor. 294; *Ex parte Watson in re Love* (1877), 5 Ch. D. 35; 46 L. J. Bank. 97; *Ex parte Cooper in re McLaren* (1879), 11 Ch. D. 68; 48 L. J. Bank. 49.

<sup>2</sup> *In re Ramsay ex parte Deacon* (1913), 2 K. B. 80; 82 L. J. Bank. 526; 20 Mans. 15; *Ex parte Wright in re Johnson* (1908), 99 L. T. 305; 52 Sol. J. 622; *Barnes v. Freeland* (1794), 6 T. R. 80; *Ex parte Suffolk in re Fletcher* (1891-1892), 9 Mor. 8; *Ex parte Fabian in re Landrock* (1884), 1 Mor. 62; *Ex parte Baller in re O'Sullivan* (1892), 61 L. J. Q. B. 228; 66 L. T. 619; 67 L. T. 464, where Williams, J., and Collins, J., differed as to the effect of re-delivery of the bills of lading to the vendors. In *Ex parte Wright in re Johnson*, *supra*, Bingham, J., expressed a preference for the view of Collins, J. As to termination of the *transitus* by the consignee taking possession as owner, see *James v. Emerson* (1837), 2 M. & W. 623.

<sup>3</sup> *Nicholson v. Bower* (1858), 1 E. & E. 172; 28 L. J. Q. B. 97.

<sup>4</sup> *Knight v. Burgess* (1864), 33 L. J. Ch. 727; *In re Worthington ex parte Pathé Frères* (1914), 2 K. B. 299; 83 L. J. K. B. 885; 21 Mans. 119.

<sup>5</sup> *In re Eastgate ex parte Ward* (1905), 1 K. B. 465; 74 L. J. K. B. 324; 12 Mans. 11; *Tilley v. Bowman* (1910), 1 K. B. 745; 79 L. J. K. B. 547; 17 Mans. 97; *Ex parte Whittaker in re Shackleton* (1875), L. R. 10 Ch. 446; 44 L. J. Bank. 91, and see notes to Chapter VI.



Where time is of the essence of a contract, and, Section 25  
after a deposit has been paid, the purchaser obtains notice of an act of bankruptcy by the vendor, the purchaser is entitled under the English Act to refuse to complete and to recover back the deposit money because the vendor cannot give either a good conveyance or a valid receipt for the purchase money<sup>7</sup>.

Where the purchaser of goods under a contract calling for deliveries from time to time becomes insolvent, the seller, notwithstanding that he may have agreed to give credit for the goods, is not bound to deliver any more goods under the contract, until he is paid the price of those goods; and if the purchaser is in arrears in any of his payments the seller is entitled to refuse to deliver any more goods till he is paid the debt due for those already delivered, as well as the price of those remaining to be delivered<sup>8</sup>. But the vendor is not justified in refusing to deliver merely because the purchaser has called certain creditors together and has stated to them that he is carrying on business at a loss and is short of working capital, and has requested them to give him an extension of time. There must be such an admission of insolvency at the time as amounts to a declaration of intention not to pay for the goods<sup>9</sup>. When the purchaser becomes bankrupt specific performance will not be enforced against his trustee; for specific performance is not granted against assignees unless they consent, and to grant the relief asked would amount to the payment to one creditor of one hundred cents on the dollar at the expense of the others<sup>10</sup>. It is otherwise when the vendor becomes bankrupt<sup>1</sup>. Thus when the full pur-

<sup>7</sup> *Powell v. Marshall, Parkes & Co.* (1899), 1 Q. B. 710; 68 L. J. Q. B. 477; 6 Mans. 157, and see notes to section 4(10) on the relation back of the title of the trustee under *The Bankruptcy Act*.

<sup>8</sup> *Ex parte Chalmers in re Edwards* (1873), L. R. 8 Ch. 289; 42 L. J. Bank. 37; *William Hamilton Mfg. Co. v. Hamilton Steel & Iron Co.* (1910), 23 O. L. R. 270.

<sup>9</sup> *In re Phoenix Bessemer Steel Co. ex parte Carnforth Iron Co.* (1876), 4 Ch. D. 108; 46 L. J. Ch. 115.

<sup>10</sup> *Holloway v. York* (1877), 25 W. R. 627.

<sup>1</sup> *Ex parte Rabbidge in re Pooley* (1878), 8 Ch. D. 367; 48 L. J. Bank. 15; *Pearce v. Bastable's Trustee* (1901), 2 Ch. 122; 70 L. J. Ch. 446; 8 Mans. 287.



**Section 25** chase money is paid before the vendor is adjudicated bankrupt, the purchaser has a right to call on the trustee for specific performance<sup>2</sup>; but where after adjudication the purchaser pays the purchase money to the bankrupt vendor and not to the trustee, he pays to the wrong person and is entitled to a conveyance from the trustee (who is the legal owner subject to the equity of the purchaser) only on payment of the balance of the purchase money to him<sup>3</sup>. Specific performance will not be given unless the parties seeking it come promptly<sup>4</sup>. Where the right to specific performance is lost, the purchaser will be a secured creditor in respect of the deposit paid, for which he is entitled to a lien on the subject matter of the contract, unless his conduct amounts to a repudiation of the contract or a Statute of Limitations applies<sup>5</sup>; or unless the contract has gone off by reason of his default; when the vendor is entitled to retain the deposit<sup>6</sup>. Subject to the exceptions above noted, the trustee, generally speaking, stands in the same position as the bankrupt himself and is, at the option of a purchaser, bound to perform the contract in exactly the same way as the bankrupt himself was bound to perform it<sup>7</sup>.

(b)  
Disclaimer  
of onerous  
contracts, or  
property.

There is no section in the Canadian Act corresponding with section 54 of the English Act which gives the trustee the right to disclaim onerous contracts or property<sup>7a</sup>. The law under *The Bankruptcy Act* in this respect will be the same as the law in England before the Act of 1869 was passed<sup>8</sup>, with the exception that

<sup>2</sup> *In re Taylor ex parte Norvell* (1910), 1 K. B. 562; 79 L. J. K. B. 610; 17 Mans. 145.

<sup>3</sup> *Ex parte Rabbidge in re Pooley*, *supra*.

<sup>4</sup> *Levy v. Stogdon* (1898), 1 Ch. 478; 67 L. J. Ch. 313.

<sup>5</sup> *Levy v. Stogdon*, *supra*.

<sup>6</sup> *Ex parte Barrell in re Parnell* (1875), L. R. 10 Ch. 512; 44 L. J. Bank. 138.

<sup>7</sup> *Ex parte Holthausen in re Scheibler* (1874), L. R. 9 Ch. 722; 44 L. J. Bank. 26, and see notes to Chapter VI.

<sup>7a</sup> See, however, section 52(6) as to leases.

<sup>8</sup> Section 23 of the English Act (1869), 32 and 33 Vic. c. 71, first gave the right of disclaimer. It may be that a distinction exists with respect to the vesting of onerous property in the trustee, between property passing under an authorized assignment and property passing under a receiving order: Contrast *Doe Palmer v. Andrews* (1827), 4



section 44 of *The Bankruptcy Act*<sup>9</sup> gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under *The Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it<sup>10</sup>. Before the Act of 1869 if the trustee repudiated the contract the person damnified could bring an action against the bankrupt personally<sup>1</sup>, to which the discharge of the bankrupt was no answer<sup>2</sup>. The law in this respect has been altered by section 44 of the Canadian Act; and the result is that on disclaimer or non-performance of the contract, the person damnified no longer has a remedy against the bankrupt but may prove against the estate<sup>3</sup>.

Where a building contract contains a clause that if the work is not finished by such and such a time, or if the contractor becomes bankrupt, the owner may employ another builder to complete it, and the contractor does become bankrupt, a person who has received an equitable assignment from the contractor of

(c)  
Position of trustee who completes contract with own money.

Bing. 348; *Magee v. Rankin* (1869), 29 U. C. Q. B. 257; *Cartwright v. Glover* (1861), 2 Giff. 620, and *Metropolitan Bank v. Offord* (1870), L. R. 10 Eq. 398; with *Copeland v. Stephens* (1818), 1 B. & Ald. 593; *Goodwin v. Noble* (1857), 8 E. & B. 587; 28 L. J. Q. B. 204; *Mackley v. Pattenden* (1861), 1 B. & S. 178; *Bishop v. Trustees of Bedford Charity* (1859), 1 El. & El. 697; *The South Staffordshire Railway Co. v. Burnside* (1850), 5 Ex. 129, and other cases cited in *Denison v. Smith* (1878), 43 U. C. Q. B. 503. Whether shares on which calls are due, which are not disclaimed by the trustee, are deemed to have been accepted by him, *quære*; see *Denison v. Smith*, and *The South Staffordshire Railway Co. v. Burnside*, *supra*. See notes to section 44.

<sup>9</sup> Which correspond to section 31 of the Act of 1869.

<sup>10</sup> *Gibson v. Carruthers* (1841), 8 M. & W. 321; *In re Sneezum ex parte Davis* (1876), 3 Ch. D. 463; 45 L. J. Bank. 137, and see *Denison v. Smith* (1878), 43 U. C. Q. B. 503.

<sup>1</sup> But not against the trustee: *In re Sneezum ex parte Davis*, 3 Ch. D. 463; 45 L. J. Bank. 137.

<sup>2</sup> *Boorman v. Nash* (1829), 9 B. & C. 145; *In re Sneezum ex parte Davis* (1876), 3 Ch. D. 463; 45 L. J. Bank. 137.

<sup>3</sup> See notes to section 44, and see section 61(2). Note the trustee is not personally liable in respect of such a contract, even when he has carried it on for a time and then abandoned it: *In re Sneezum ex parte Davis*, *supra*. See as to disclaimer of after-acquired property under the English Act: *In re Clayton and Barclay's Contract* (1895), 2 Ch. 212; 64 L. J. Ch. 615.



Section 25 money due under the contract will have a claim on those moneys in priority to the trustee of the bankrupt who has advanced his own moneys and completed the contract, where the trustee has carried on under the old contract; but not where he has completed the work under a new arrangement with the owner<sup>4</sup>.

(3) Shares.

The expression "thing in action" does not include merely a right to sue for a debt or damages; it includes for example a share in an incorporated company transferable only by deed<sup>5</sup>. *Prima facie* the trustee is entitled in England to a "clean" certificate like that possessed by the person from whom he derived his title; even where the company claims a lien on the shares of the bankrupt in respect of an alleged liability to the company<sup>6</sup>; and is entitled to have his name entered on the books of the company without any statement that he holds the shares as such trustee<sup>7</sup>. If there are two or more trustees they may have their holding of shares split into two joint holdings with their names in what order they choose<sup>8</sup>.

The tenth clause of Table A of the schedule to the *English Companies Act, 1862*<sup>9</sup> does not apply to persons claiming shares by transmission under the 13th clause<sup>10</sup>. Therefore where a company has adopted Table A as its articles of association, it cannot refuse to register the name of the trustee in bankruptcy of a shareholder on the ground that the shareholder is indebted to the company<sup>1</sup>. The principle established

<sup>4</sup> *Drew v. Josolyne* (1887), 18 Q. B. D. 590; 56 L. J. Q. B. 490; *Tooth v. Hallett* (1869), L. R. 4 Ch. 242; 38 L. J. Ch. 396.

<sup>5</sup> *Per Blackburn, L.J.*, in *Colonial Bank v. Whinney* (1886), 11 A. C. 426; 56 L. J. Ch. 43; 3 Mor. 207; contrast *Union Bank of Manchester in re Jackson* (1871), L. R. 12 Eq. 354, and see notes to section 2(*dd*).

<sup>6</sup> *In re Key & Sons, Ltd.* (1902), 1 Ch. 467; 71 L. J. Ch. 254; 9 Mans. 181.

<sup>7</sup> *In re Saunders & Co.* (1908), 1 Ch. 415; 77 L. J. Ch. 289; 15 Mans. 142.

<sup>8</sup> *In re Saunders & Co.*, *supra*; *Burns v. Siemens Bros. Dynamo Works* (1919), 1 Ch. 225.

<sup>9</sup> 25 & 26 Vic. c. 89, which reads: "The company may decline to register any transfer of shares made by a member who is indebted to them".

<sup>10</sup> Which reads, "any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member . . . may be . . . registered as a member upon such evidence being produced as may from time to time be required by the company".

<sup>1</sup> *Re Bentham Mills Co.*, 11 Ch. D. 900; 48 L. J. C. H. 671.



in *Dearle v. Hall*<sup>2</sup> as to the effect of notice in determining priorities of equitable rights does not extend to the shares of companies governed by regulations having a provision similar to section 30 of *The Companies Act*, 1862<sup>3</sup>. Where a trustee in bankruptcy of a director shareholder is registered as the transferee of the bankrupt in respect of his shares, without any description indicating that he holds the shares in the right of the bankrupt, he holds those shares "in his own right" within the meaning of that phrase as a requirement in the qualification of a director<sup>4</sup>. A trustee who takes no steps to notify the company of his title<sup>5</sup> will be postponed to a registered purchaser for value from the executrix of the bankrupt<sup>6</sup>. Where a trustee in bankruptcy of a shareholder in a company has given notice to the directors claiming the bankrupt's shares as his, but postponing his decision whether he would be registered himself or have some nominee registered as transferee, and the bankrupt subsequently tenders for registration in his own name a transfer of other shares, the directors have no authority to refuse to register it, on the ground that the trustee in bankruptcy is entitled to the shares. The right of the trustee is assisted and not defeated by putting the shares in the name of the transferee<sup>7</sup>.

Section 25

As to the property in the possession of the debtor which is claimed by a third party on the ground that it has been given to him by the debtor, it should be noted that a parol gift of a chattel capable of delivery does not pass the property in the chattel without delivery<sup>8</sup> unless the chattel is in the possession of the

(4) Alleged gifts.

<sup>2</sup> 3 Russ. 1.

<sup>3</sup> *Société Général de Paris v. Tramways Union Co., Ltd.* (1884), 14 Q. B. D. 424. Section 30 reads: "No notice of any trust, expressed, implied or constructive, shall be entered on the Register, or be receivable by the Registrar, in the case of the companies under this Act and registered in England or Ireland". Contrast *The Dominion Companies Act*, R. S. C. (1906), c. 79, s. 41.

<sup>4</sup> *Boschoek Proprietary Co. v. Fuke* (1906), 1 Ch. 148, 161; 75 L. J. Ch. 201; 13 Mans. 100; *Ex parte Harrison in re Cannock Colliery Co.*, 28 Ch. D. 363; 54 L. J. Ch. 554.

<sup>5</sup> Other than the publication in the Gazette of the required notice.

<sup>6</sup> *In re London & Provincial Telegraph Co.* (1870), L. R. 9 Eq. 653; 39 L. J. Ch. 419.

<sup>7</sup> *Sutton v. English and Colonial Produce* (1902), 2 Ch. 502; 71 L. J. Ch. 685; 10 Mans. 101.

<sup>8</sup> *Cochran v. Moore*, 25 Q. B. D. 57; 59 L. J. Q. B. 377.



**Section 25** intended donee, in which case no further act of delivery is necessary<sup>9</sup>. Gifts must be distinguished from informal transfers for value<sup>10</sup>.

(5) Miscellaneous matters.

Property vesting in the trustee<sup>1</sup> includes a right of set-off<sup>2</sup> and the debtor's reversionary interest in an estate<sup>3</sup>. Where as in England *The Bills of Sale Act* renders void as against a trustee in bankruptcy a bill of sale which has not been registered, and a debtor prior to bankruptcy gave two bills of sale covering the same property, the second of which was registered, the second mortgagee is entitled to such of the chattels as have not been seized by the first mortgagee before bankruptcy<sup>4</sup>. Except where there is some offence against the bankruptcy law or some law in favour of creditors, the trustee is merely the legal representative of the debtor with such rights as he would have had if not bankrupt and no others<sup>5</sup>, and where the bankrupt being *in pari delicto* with a defendant could not have recovered back certain property, his trustee cannot recover it back<sup>6</sup>. Where property of the bankrupt has been paid away by him under circumstances which entitle the trustee either to sue for a return of the property or for damages, the trustee is put to his election and cannot after recovering under one remedy seek to recover under another<sup>7</sup>.

D.  
Trustee  
should perfect his title to a chose in action.

Included in the property of the debtor vesting in the trustee are *choses in action*<sup>8</sup>. Whatever may be the effect of section 11(4) on the necessity or otherwise for compliance with provincial laws with respect to regis-

<sup>9</sup> *In re Strickam, Stoneham v. Stoneham* (1919), 1 Ch. 149; cf. *Shuttleworth v. McGillivray* (1903), 5 O. L. R. 536; *Kingsmill v. Kingsmill* (1917), 41 O. L. R. 238.

<sup>10</sup> *Ex parte Brown in re Dodds* (1891), 60 L. J. Q. B. 599; 8 Mor. 86.

<sup>1</sup> See generally notes to 2(dd).

<sup>2</sup> *Court v. Holland* (1881), 29 Gr. 19, and see section 28.

<sup>3</sup> *Grey v. Hatch* (1871), 18 Gr. 72.

<sup>4</sup> *Ex parte Leman in re Barrand* (1876), 4 Ch. D. 23; 46 L. J. Bank. 38, and see Chapter VI.

<sup>5</sup> *In re Mapleback ex parte Caldecott* (1876), 4 Ch. D. 150; 13 Cox. 374.

<sup>6</sup> S. C. and see Chapter VI.

<sup>7</sup> *Smith v. Baker* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; *Vernon v. Hanson* (1788), 2 T. R. 287; *Smith v. Hodson* (1791), 2 S. L. C. 139; 4 T. R. 211.

<sup>8</sup> See as to definition and examples of *choses in action*, notes to section 2(dd).



tration of documents, it is clear that that section has no reference to the rule of law that a trustee in bankruptcy must give notice<sup>9</sup> in order to perfect his title to a *chose in action*<sup>10</sup>. The grounds of this decision are first that bankruptcy is not notice to all the world; and secondly, that the vesting of the property of the bankrupt in the trustee by operation of law has no higher effect than a vesting of the same property by act of parties; the equitable doctrine enunciated in *Dearle v. Hall*<sup>1</sup> applying in each case<sup>2</sup>. By so perfecting his title the trustee will acquire priority over an assignee to whom the bankrupt has assigned a *chose in action*

<sup>9</sup> Or in the case of a fund in court obtain a stop order: *Stuart v. Cockerell* (1869), L. R. 8 Eq. 607; 39 L. J. Ch. 127.

<sup>10</sup> *In re Barr's Trusts* (1857), 4 K. & J. 219; 27 L. J. Ch. 548; *In re Brown's Trusts*, L. R. 5 Eq. 88; *In re Atkinson* (1852), 2 D. M. & G. 140; *Palmer v. Locke* (1881), 18 Ch. D. 381, 385, 386; 51 L. J. Ch. 124; 45 L. T. 229; 30 W. R. 419. It was previously held on the wording of the English Act of 1849, 12 & 13 Vic. c. 106, s. 141, that an assignment after bankruptcy by a bankrupt of a reversionary interest does not prevail against the title of the trustee, for the bankrupt had no power to deal with the property: *In re Combes' Trusts* (1859), 1 Giff. 91; *In re Bright's Settlement* (1879), 13 Ch. D. 413; 28 W. R. 551; 42 L. T. 308; and see *McEntire v. Potter & Co.* (1889), 22 Q. B. D. 438; 60 L. T. 600; 37 W. R. 607.

<sup>1</sup> The leading case of *Dearle v. Hall* (1828), 3 Russ. 1, laid down the principle that where a fund is legally vested in trustees an assignee or incumbrancer who first gives notice to the trustees has a better title in equity than an assignee or incumbrancer of earlier date, who has not given such notice. By such notice the legal holders are converted into trustees for the new purchaser and are charged with responsibility toward him, and the *cestui que trust* is deprived of the power of carrying the same security into the market, and of inducing third persons to advance money upon it. See *per* Herschell, L.C., in *Ward v. Duncombe* (1893), A. C. 369; 69 L. T. 121; 42 W. R. 59. It makes no difference that there was no negligence on the part of the first incumbrancer, who never knew of the charge created in his favour, for the doctrine rests on other grounds beside the ground of *laches*: *Ex parte Cavendish in re Lake* (1903), 1 K. B. 151; 72 L. J. K. B. 117; 10 Mans. 17; *English and Scottish Mercantile Investment Co. v. Brunton* (1892), 2 Q. B. 1; 66 L. T. 767; *Dearle v. Hall* has been followed *In re Freshfield's Trusts* (1879), 11 Ch. D. 198; *Montefiore v. Guedalla* (1903), 2 Ch. 26; 72 L. J. Ch. 442; 88 L. T. 496; *Marchant v. Morton* (1901), 2 K. B. 829; 85 L. T. 169; *Ex parte Cavendish in re Lake* (1903), 1 K. B. 151; 72 L. J. K. B. 117; 10 Mans. 17; *English and Scottish Mercantile Investment Co. v. Brunton* (1892), 2 Q. B. 1; 66 L. T. 767; *In re Dallas* (1904), 2 Ch. 385; 73 L. J. Ch. 365; *Dearle v. Hall* was distinguished in *In re Richards*, 45 Ch. D. 589; 59 L. J. Ch. 728; *Société Général v. Walker*, 11 A. C. 20; 55 L. J. Q. B. 169; and in *Ward v. Duncombe*, *supra*.

<sup>2</sup> See also *In re Stone's Will* (1893), W. N. 50; and *cf.* *In re London & Provincial Telegraph Co.* (1870), L. R. 9 Eq. 653; 39 L. J. Ch. 419; *Brown's Trusts*, L. R. 5 Eq. 88; *Stuart v. Cockerell* (1869), L. R. 8 Eq. 607; 39 L. J. Ch. 127.



## Section 25

acquired after the date of the bankruptcy, who has not first perfected his title<sup>3</sup>, but as the trustee stands in the shoes of the bankrupt and is not an assignee for value of a *chose in action*, he cannot by giving notice obtain priority over a prior equitable encumbrancer to whom the property was assigned by the bankrupt prior to the effective date of bankruptcy<sup>4</sup>. The same principle applies where there have been two adjudications, one in New Zealand and one in England. Though the trustee in England is the first to discover a *chose in action* to which the bankrupt was entitled, and the first to give notice to the person in possession of the trust funds, the English trustee does not gain priority over the New Zealand trustee to whom all the moveable property of the bankrupt wheresoever situate has already passed<sup>5</sup>. As a matter of precaution, the trustee in bankruptcy should himself give notice to the trustee of the trust fund in order to perfect his title, although this is not necessary; for so long as the trustee of the trust fund obtains notice from any source, which brings his mind to an intelligent apprehension of the true facts, so that an ordinary man of business would regulate his conduct by the information obtained, that will be sufficient<sup>6</sup>; but notice to solicitors for trustees is not notice to the trustees<sup>7</sup>. Where notice of the assignment is given to all the trustees in existence at the time of the assignment, it is unnecessary to give any further notice even though all the trustees die or retire<sup>8</sup>; but it has been

<sup>3</sup> *Mercer v. Vans Collina* (1900), 1 Q. B. 130 n; 67 L. J. Q. B. 424; 4 Mans. 363; *In re Beall ex parte O. R.* (1899), 1 Q. B. 688; 68 L. J. Q. B. 462; 6 Mans. 163.

<sup>4</sup> *In re Wallis ex parte Jenks* (1902), 1 K. B. 719; 71 L. J. K. B. 465; 9 Mans. 136.

<sup>5</sup> *In re Anderson* (1911), 1 K. B. 896; 80 L. J. K. B. 919; 18 Mans. 216.

<sup>6</sup> *Lloyd v. Banks* (1868), L. R. 3 Ch. 488; 37 L. J. Ch. 881; see however in the case of *choses in action* acquired after the bankruptcy. In such case mere knowledge of the bankruptcy seems not to be sufficient: *In re Behrend's Trust* (1911), 1 Ch. 687; 80 L. J. Ch. 394; 18 Mans. 111.

<sup>7</sup> *Saffron Walden v. Rayner* (1880), L. R. 14 Ch. D. 406.

<sup>8</sup> *In re Wasdale ex parte Brittin v. Partridge* (1899), 1 Ch. 163; 68 L. J. Ch. 117; and see *Timson v. Ramsbottom* (1837), 2 Keen 35; *In re Hall*, L. R. 7 Ir. 180; *Ward v. Duncombe* (1893), A. C. 369; 69 L. T. 121; 42 W. R. 59.



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held that where an assignee gives notice to one only of several trustees, and that trustee dies before notice is received of the second assignment, the earlier assignee loses his priority<sup>9</sup>. On the other hand where notice is given to one of two trustees of both the first and second assignments, notice being given to the other trustee of the second assignment only, and the first mentioned trustee thereafter dies, his death will not give the second assignment priority over the first<sup>10</sup>, unless the bankrupt is himself that trustee, when the knowledge which he has is not imputed to the other trustees<sup>1</sup>. Cases of assignment of *choses in action* must be distinguished from cases where the trustee on becoming legal owner of real property through the vesting of the estate in him acquires the right to the payment of the balance of the purchase money, which in such a case is not a *chose in action*. If therefore the purchaser without notice of the title of the trustee pays the balance of the purchase money to the bankrupt, he will have to pay it over again before he can obtain a conveyance of the property<sup>2</sup>.

There is no provision in the Canadian Act to correspond with section 48(5) of the English Act, which reads:

"Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee."

This section appears to have been enacted having in contemplation section 36 and and 37 Vic. c. 66, section 25(6) of *The English Judicature Act*, which has been copied in most of the Provinces of Common Law jurisdiction<sup>3</sup>.

<sup>9</sup> *Timson v. Ramsbottom*, *supra*; *In re Hall*, L. R. 7 Ir. 180; *In re Phillips' Trusts* (1903), 1 Ch. 183; 70 L. J. Ch. 94.

<sup>10</sup> *Ward v. Duncombe* (1893), A. C. 369; 69 L. T. 121.

<sup>1</sup> *Browne v. Savage* (1859), 4 Drew 635; *Lloyd's Bank v. Pearson* (1901), 1 Ch. 865; 70 L. J. Ch. 422; *In re Dallas* (1904), 2 Ch. 385; 73 L. J. Ch. 365.

<sup>2</sup> *Ex parte Rabbidge in re Pooley* (1878), 8 Ch. D. 367; 48 L. J. Bank. 15.

<sup>3</sup> Sections 36 and 37 Vic. c. 66; section 25(6) reads:

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would



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E.  
After-acquired  
property.

Where a receiving order has been made, the property of the debtor divisible among his creditors includes all property which may be acquired by or devolve on him before his discharge. There is no such provision in the case of an authorized assignment. By virtue of the rule of law first laid down in *Cohen v. Mitchell*,<sup>4</sup> and now given statutory form in section 34(1) of the Act, the after-acquired property of the bankrupt vests in the trustee in a qualified sense until he intervenes, when it vests indefeasibly in him<sup>5</sup>. Thus where a bankrupt purports to make an assignment of an after-acquired *chose in action*, the trustee by giving notice or by obtaining a stop order will effectively intervene, and will obtain priority if his notice or stop order is the first in point of time<sup>6</sup>. All the after-acquired personal earnings of a bankrupt, over and above what is required for the maintenance of his

have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

"Debt or other *chose in action*" means a debt or right which the common law looks on as not assignable by reason of its being a *chose in action*, but which a Court of Equity deals with as being assignable." *Torkington v. Magee* (1902), 2 K. B. 427; 72 L. J. K. B. 712; and see *Dawson v. G. N. and City Railway* (1905), 1 K. B. 260, 270; 74 L. J. K. B. 190. One of the results of this enactment is that when an absolute assignment has been made in writing, under the hand of the assignor, and when the assignee has given the prescribed notice he may bring an action at law in his own name without being incumbered with having to sue in the name of the assignor, or of having to make him a party to the action: *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511; 53 L. J. Q. B. 280.

<sup>4</sup> (1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 7 Mor. 207.

<sup>5</sup> *Hill v. Settle* (1917), 1 Ch. 319; and see further on the distinction formerly laid down as to the difference in vesting in the cases of after-acquired real property and after-acquired personal property: *In re New Land Development Association & Gray* (1892), 2 Ch. 138; 61 L. J. Ch. 495; *O. R. v. Cooke* (1906), 2 Ch. 661; 75 L. J. Ch. 757; 13 Mans. 337.

<sup>6</sup> *Mercer v. Vans Colina* (1897), 67 L. J. Q. B. 424; 4 Mans. 363.



family, can be claimed by the trustee'. The profits from a business are not "personal earnings," even though the business involves a large amount of personal skill<sup>8</sup>. It is no test as to whether moneys are "personal earnings" to enquire whether they are the result of more or less continuous employment so that there is some element of periodicity attached to them<sup>9</sup>. Section 25

All contracts made by the debtor before his assignment or bankruptcy are the property of the trustee; and all contracts made after his bankruptcy and before his discharge also are the property of the trustee. This rule applies to life insurance as well as to other contracts. The benefit of any insurance so effected by the debtor belongs to the trustee; and if after the bankrupt's discharge he or any other volunteer pays the succeeding premiums, he pays them for the benefit of the contract vested in the trustee, who will be entitled to the policy moneys when they fall due<sup>10</sup>. But where the trustee stands by with knowledge and allows the premiums to be paid by the debtor's wife, the trustee

<sup>8</sup> *In re Hancock* (1904), 1 K. B. 585; 73 L. J. K. B. 245; 11 Mans. 1; *Clarkson v. White* (1884), 4 O. R. 663; *In re Rogers ex parte Collins* (1894), 1 Q. B. 425; 63 L. J. Q. B. 178; 1 Mans. 387; *In re Graydon ex parte O. R.* (1896), 1 Q. B. 417; 65 L. J. Q. B. 328; 3 Mans. 5; *In re Roberts* (1900), 1 Q. B. 122; 69 L. J. Q. B. 19; 7 Mans. 5; *Clarkson v. White* (1884), 4 O. R. 663. Cases of compensation for breach of a contract to employ a man *in futuro* should be distinguished from actions for the recovery of "personal earnings" which are due: *Wadling v. Oliphant* (1875), 1 Q. B. D. 145; 45 L. J. Q. B. 173; see further as to the trustee's right to sue for "personal earnings," notes on Rights of Action, *ante*.

<sup>9</sup> *Elliott v. Clayton* (1851), 16 Q. B. D. 581; 20 L. J. Q. B. 217; *Emden v. Carte* (1881), 17 Ch. D. 169, 768; 50 L. J. Ch. 492; *In re Rogers ex parte Collins, supra*; *In re Dowling ex parte Banks* (1877), 4 Ch. D. 689; 46 L. J. Bank. 74; *Crofton v. Pool* (1830), 1 B. & Ad. 568, and compare *Silk v. Osborne* (1794), 1 Esp. 140.

<sup>10</sup> *Per Buckley, J.*, in *Affleck v. Hammond* (1912), 3 K. B. 162; 81 L. J. K. B. 565; 19 Mans. 111; see contra, *Mercer v. Vans Colina* (1897), 67 L. J. Q. B. 424; 4 Mans. 363; and see *Byrne v. Henry* (1892), 9 Mor. 213. See as to the distinction under the English Act between "personal earnings" and salary or income, *In re Jones ex parte Lloyd* (1891), 2 Q. B. 231; 60 L. J. Q. B. 751; 8 Mor. 210; *In re and ex parte Shine* (1892), 1 Q. B. 522; 61 L. J. Q. B. 253; 9 Mor. 40; and see further as to salary or income under the English Act: *Hollinshead v. Hazelton* (1916), A. C. 428; 85 L. J. P. C. 60; (1916) H. B. R. 85.

<sup>11</sup> *In re Leslie, Leslie v. French* (1883), 28 Ch. D. 552; 52 L. J. Ch. 762; *In re Stokes ex parte Mellish* (1919), 2 K. B. 256; 88 L. J. K. B. 794; (1918-19), B. & C. R. 208; *Tapster v. Ward* (1909), 10 L. T. 25, 503; *In re Phillips ex parte O. R.* (1914), 2 K. B. 689; 83 L. J. K. B. 1364; 21 Mans. 144.



**Section 25** will not be permitted by the court to intervene and take the policy moneys without making an allowance to the wife<sup>11</sup>.

Where a bankrupt, being issue of the testator, to whom realty or personalty is devised for an estate not determinable at or before the death of the bankrupt, dies in the lifetime of the testator leaving issue, and such issue is living at the time of the death of the testator, the devise or bequest will not lapse in those provinces in which the equivalent of section 33 of the *English Wills Act* (1837) 1 Vic. c. 26, is in force<sup>12</sup>, but unless a contrary intention appears by the will, the devise or bequest will take effect as if the death of the bankrupt had happened immediately after the death of the testator, and consequently the property in question being property devolving on the bankrupt before his discharge will vest in his trustee in bankruptcy and not in his legal personal representative<sup>1</sup>.

Property acquired after the making of a receiving order, but before discharge, belongs where there are two or more receiving orders to the trustee under the first receiving order<sup>2</sup>.

F.  
The capacity  
to exercise  
powers.

The time from which the capacity to exercise powers vests in the trustee is from "the date of the said petition or assignment"<sup>3</sup>. The words in 25(a) are "at the date of the presentation of any bankruptcy petition, or at the date of the execution of an authorized assignment." It is only the capacity to exercise those powers which the debtor might exercise for his own benefit which pass to the trustee. The trustee can exercise the power by deed in a manner in which the bankrupt could exercise it; but he cannot so exercise it after

<sup>11</sup> *In re Tyler ex parte O. R.* (1907), 1 K. B. 865; 76 L. J. K. B. 541; 14 Mans. 73.

<sup>12</sup> See R. S. O. (1914), c. 120, s. 37.

<sup>1</sup> *In re Pearson, Smith v. Pearson* (1920), 1 Ch. 247; 89 L. J. Ch. 123; (1920), B. & C. R. 38.

<sup>2</sup> *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806; 1 Mans. 207. The English practice is different since section 39 of the Act of 1914 was passed: *In re Cullwick ex parte O. R.* (1918), 1 K. B. 646; 87 L. J. K. B. 827; (1918-19), B. & C. R. 33; *In re Cohen ex parte O. R.* (1918-19), B. & C. R. 214.

<sup>3</sup> Section 25(b).



the death of the bankrupt<sup>4</sup>. It was held by Farwell, J., Section 26 that the capacity of releasing the power of appointment for his own benefit possessed by the donee of a limited power of appointment cannot on his bankruptcy be exercised by his trustee in bankruptcy for the benefit of his estate<sup>5</sup>. It has been decided by Warington, J., that the property of the debtor divisible among his creditors does not include a fund over which the bankrupt has a general testamentary power of appointment<sup>6</sup>. A bankrupt may not by the exercise of a power of appointment defeat the interest of his trustee<sup>7</sup>. Powers generally are treated in Sugden on Powers, Farwell on Powers, and Halsbury Laws of England, vol. 23<sup>8</sup>.

There is no section in *The Bankruptcy Act* similar to section 48(3) of the *English Act* of 1914, which gives the trustee the right to transfer shares of the bankrupt. The reason for this omission will remain a matter for speculation<sup>9</sup>.

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26 (1) No property of an estate of a bankrupt or of an authorized assignor shall be removed out of the province where such property was at the date when any receiving

Property not to be removed from Province.

<sup>4</sup> *Nichols to Nixey* (1885), 29 Ch. D. 1005; 55 L. J. Ch. 146; *Ex parte Gilchrist in re Armstrong* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 778; 3 Mor. 193.

<sup>5</sup> *In re Rose* (1904), 2 Ch. 348; 73 L. J. Ch. 726; following *In re Hirst* (1892), W. N. 177; but in the Court of Appeal no opinion was expressed on this point: *In re Rose* (1905), 1 Ch. 94; 74 L. J. Ch. 22; 11 Mans. 347.

<sup>6</sup> *In re Guedalla* (1905), 2 Ch. 331; 75 L. J. Ch. 52; 12 Mans. 392. See remarks on this case in the Court of Appeal: *In re Benzon, Bower v. Chetwynd* (1914), 2 Ch. 68, 74; 83 L. J. Ch. 658; 58 Sol. J. 430; 21 Mans. 8.

<sup>7</sup> *In re Cooper* (1884), 27 Ch. D. 565.

<sup>8</sup> As to exercise of power by married woman, see *Ex parte Gilchrist in re Armstrong* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 3 Mor. 193.

<sup>9</sup> Under the English Act it has been held that a trustee who is not upon the register has no right to vote; and that so long as the name of the bankrupt remains upon the register he has, even though he has mortgaged his shares to unregistered third parties and the trustee has disclaimed whatever beneficial interest the bankrupt may have in the shares, a voting power as between the real owners and the other shareholders by reason of being on the register: *Wise v. Landsdell* (1920), B. & C. R. 145.



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Section 27

Moneys to  
be deposited  
in bank.

Not into  
private  
account.

order or authorized assignment was made, without the permission in writing of the inspectors or the order of the court in which proceedings under this Act are being carried on or within the jurisdiction of which such property is situate.

(2) The trustee shall deposit in a chartered bank the proceeds of the sale of any property of the estate of the bankrupt or the authorized assignor and all other moneys realized on account of any trust estate which he is administering under this Act and he shall not withdraw or remove therefrom, without the permission in writing of the inspectors or the order of the court, any such moneys, except for payment of dividends and other charges incidental to the administration of the estate.

(3) No trustee in a bankruptcy or under any authorized assignment or composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account.

**Cross References Act:** Inspectors, 43; courts and jurisdiction, 63 *et seq.*; property of bankrupt, 25 & 2(*dd*); duties and powers of trustee, 17 *et seq.*; power of trustee to sell, 20(1) (*a*); offences, 96.

**Analogous Legislation:** English Act, 1914, s. 88; Canadian Act, 1875, s. 45; Provincial Assignments Acts, R. S. O. 1914, c. 134, s. 29; R. S. M. 1913, c. 12, s. 36.

*The Bankruptcy Act Amendment Act*, 1921, sec. 20, amended section 26(1)(2) by substituting the word "permission" for "consent". The amendment has been made in the text printed here.

Under *The Insolvent Act* of 1875, the trustee was required to keep a separate account for each trust estate administered by him<sup>10</sup>.

Continuance  
of business  
by trustee.

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27. If the trustee is directed to continue the business of a debtor he may incur obligations and make necessary or advisable

<sup>10</sup> (1875), 38 Vic. c. 16, s. 45 (Dom.).



advances, which obligations and advances so incurred or made shall be discharged or repaid to the trustee out of the assets of the debtor in priority to the claims of the creditors. Provided that,—

Section 27

- (a) the creditors or inspectors may by resolution limit the amount of the obligations or advances which may be made or paid by the trustee in the continuance of the business or the period of time for the continuance of the business; and,
- (b) the trustee shall not be under obligation to continue the business if in his opinion the realizable value of the assets of the debtor is insufficient to fully protect him against possible loss from so doing, and if the creditors, upon demand made by the trustee, neglect or refuse to secure him against such possible loss.
- (c) If the creditors, within ten days after demand by the trustee (made to the inspectors or at any meeting of creditors called by the trustee for the purpose of making such demand) refuse or neglect to repay to the trustee all money advances made by him or obtained in whole or in part upon his credit or responsibility and to secure the trustee to an extent adequate in his opinion or (if the trustee and the creditors cannot agree) in that of the court, in respect of all liabilities incurred or which may be incurred by the trustee in so carrying on the business of the debtor, the court may, upon application of the trustee, order that the property of the debtor be offered for sale by tender, to be addressed to and opened by the court, at any time to be named by the court, and after such advertisement and opening of any tenders received and subject to the directions and approval of the court, sell

Trustee carrying on business of debtor may apply to court for sale of property by tender if creditors refuse or neglect to repay advances.

Tenders and sale.



Section 27

Court may  
permit  
trustee to  
purchase  
property if  
tenders are  
insufficient.

the whole or any part of the property of the debtor and apply the proceeds to the payment of the advances, liabilities, expenses and proper costs made and incurred by the trustee in the administration of the estate of the debtor.

- (d) If the property of a debtor shall be so offered for sale and, within thirty days after the time set for the opening of tenders, no tender or offer of an amount sufficient to repay the advances made and liabilities incurred by the trustee and also his proper costs and expenses, shall be received by the court, then the court may, after such notice to the debtor and the creditors as to it may seem proper, permit the trustee, in his personal capacity, to bid such a sum as shall be sufficient to repay him his advances, costs, expenses, and the amount of any liabilities incurred by him and reasonable remuneration and (conditional upon no higher bid being received before actual vesting of the property in him in his personal capacity) to purchase the whole or any part of such property at such prices and upon such terms as shall be approved by the court. If the trustee shall so purchase the whole or any part of such property it shall pass to and vest in him in his personal capacity when the court shall so order, whereupon all rights and interests of the debtors and the creditors in or to it shall become determined and ended.

**Cross References Act:** Trustee may carry on the business, 13(3), 20(1)(b); trustee may appoint debtor to carry on his trade, 21; priority of claims, 51.

Section 27(c)(d) was first enacted by section 24 of *The Bankruptcy Act Amendment Act, 1921*.

The wisdom of the provision contained in section 27(d), under which the court may permit the trustee



to purchase property, was much debated in the House of Commons when the amendment was proposed. As to other cases where the trustee has been allowed to purchase see notes to sections 20(1)(a) and 43. Section 28

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- 28 (1) The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences. Law of set-off to apply.
- (2) If any debtor who has made an authorized assignment or against whom a receiving order has been made, owes or owed debts both individually and as a member of one or more different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full. How claims are to rank where different estates.

**Cross References Act:** Debts provable, 44; actions by trustee, 20(1)(c); fraudulent preferences, 31, 3(c); fraudulent conveyance, 3(b); settlements, 29; applicability of joint and separate estate in payment of joint and separate debts, 51(3).

**Analogous Legislation to section 28(1):** Canadian Acts, 1875, s. 107; 1869, s. 124. English Acts, 1914, s. 31; 1883, s. 38; 1869, s. 39. Winding-up Act, 1906, s. 71. English Companies Act, 1862, s. 101. Ontario Assignments Act, 1914, s. 31. Manitoba Assignments Act, 1913, s. 26.

**To section 28(2):** Canadian Acts, 1875, s. 88; 1869, s. 64. English Act, 1914, s. 33(6). Ontario Assignments Act, 1914, s. 10. Manitoba Assignments Act, 1913, s. 27.



## Section 28

## ANALYSIS OF NOTES.

Difference between English and Canadian provisions.  
 Set-off and counterclaim.  
 Right to set-off must be mutual.  
 No set-off against calls on shares.  
 Set-off and preference.  
 Time when mutual relationship must exist.  
 Debts accruing due.  
 Set-off generally.  
 Knowledge of insolvency immaterial.  
 Incorporation of bankruptcy provisions in a deed.  
 Section 28(2).

Section 28(1) has been taken from the Canadian Act of 1875, section 107; which section was copied into the Ontario and other Provincial Assignments Acts, and with some changes into *The Canadian Winding-Up Act*. It is perhaps unfortunate that the wording of the corresponding English section<sup>1</sup>, was not followed. By importing the practice of set-off as it exists in the different provinces in actions between plaintiff and defendant, further opportunity is given for diversity in the bankruptcy *forum*, and the well defined rules of bankruptcy administration which have been developed under the English practice will not always be applicable. The French version of the Act renders "The law of set-off" by "La loi des compensations." In Quebec there is compensation but no set-off<sup>2</sup>. It will, no doubt, be found that section 28(1) has in Quebec a somewhat similar effect to section 71 of *The Winding-up Act*, that is to say while no right of compensation is taken away the right to be enforced must be one which would have existed had the debtor not been brought under the operation of the Act<sup>3</sup>.

Difference  
 between  
 English and  
 Canadian  
 provisions.

There is a marked difference between this section and the English Act with respect to set-off<sup>4</sup>, for the right of set-off in bankruptcy under the English prac-

<sup>1</sup> Section 31.

<sup>2</sup> Arts. 1187-1197 Civil Code: *Vanier v. Kent* (1902), Q. R. 11 K. B. 373, 385, and see *Ryland v. DeLisle*, 6 Moore P. C. (N. S.) 325; *Gilman v. Court*, 13 R. L. 619 (Q. B.); *Perkins v. Ross*, 6 Q. L. R. 65 (Q. B.); *Riddell v. Gould*, M. L. R. 51 S. C. 170; *Exchange Bank v. Canadian Bank of Commerce*, M. L. R. 2 Q. B. 476; *Communaute des Soeurs v. Kent*, Q. R. 13 K. B. 483.

<sup>3</sup> *Vanier v. Kent*, *supra*.

<sup>4</sup> *Mason v. Macdonald* (1880), 45 U. C. Q. B. 113, and see English Act, 1914, s. 31.



tice does not rest on the same principle as the right of set-off between solvent parties. The latter was first given in England by the Statutes of set-off<sup>5</sup>, to prevent cross-actions; but under the wording of the English Bankruptcy Statutes the object is not to avoid cross-actions, but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor or his estate<sup>6</sup>. Under the English section all claims provable in bankruptcy can be set-off provided there is mutuality, and provided an account can be taken when the set-off arises<sup>7</sup>. Thus the English section allows a set-off for unliquidated damages when these are provable<sup>8</sup>.

*Semble*, set-off is a matter of procedure and governed by the *lex fori*<sup>9</sup>. In most provincial jurisdictions the law of set-off is governed by the Judicature Acts and Rules of Practice<sup>10</sup>.

Set-off is to be distinguished from counterclaim<sup>1</sup>, but in some provincial jurisdictions a discretion is given to the trial judge to give judgment for the balance of a counterclaim after deducting what the plaintiff has recovered on the judgment<sup>2</sup>. Set-off and counter-claim.

<sup>5</sup> 2 Geo. II. c. 22, s. 13, and 8 Geo. II. c. 24, s. 4.

<sup>6</sup> Per Park, B., in *Forster v. Wilson* (1843), 12 M. & W. 191. The court there said that the "mutual credit" clause in the set-off section of the English Bankruptcy Act did not authorize a set-off where the debt though legally due to the debtor from the bankrupt, was really due to him as trustee for another, and though recoverable in a cross-action would not have been recovered for his own benefit.

<sup>7</sup> *Booth v. Hutchinson* (1872), L. R. 15 Eq. 30; 42 L. J. Ch. 492; *In re Mid-Kent Fruit Factory* (1896), 1 Ch. 567; 65 L. J. Ch. 250; 3 Mans. 59; *In re Daintry ex parte Mant* (1900), 1 Q. B. 546; 69 L. J. Q. B. 207; 7 Mans. 107; *Palmer v. Day* (1895), 2 Q. B. 618; 64 L. J. Q. B. 807; 2 Mans. 386; *In re Rushford ex parte Holmes* (1906), 95 L. T. 807; 14 Mans. 135; *In re H. B. Thorne & Son, Ltd.* (1914), 2 Ch. 438.

<sup>8</sup> *Booth v. Hutchinson*, *supra*; *Jack v. Kipping* (1882), 9 Q. B. D. 113; 51 L. J. Q. B. 463; *In re Mid-Kent Fruit Factory*, *supra*.

<sup>9</sup> *Macfarlane v. Norris* (1862), 2 B. & S. 783.

<sup>10</sup> Set-off generally is treated in Halsbury, Laws of England, Vol. 25, pp. 481 *et seq*; Holmested's Ontario Judicature Act, 4th ed., pp. 297-8. 516-519; Seton on Decrees; MacKenzie & Chitty. 1920, Annual Practice, pp. 242 *et seq.*, *et passim*, and see *Mason v. MacDonald* (1880), 45 U. C. Q. B. 113, and *Rose v. Hart*, 11 S. L. C.

<sup>1</sup> *Gates v. Seagram* (1909), 10 O. L. R. 216; *Crain v. Wade* (1917), 55 S. C. R. 209; *Thompson v. Big Cities* (1910), 21 O. L. R. 394; *Grills v. Farah* (1910), 21 O. L. R. 457.

<sup>2</sup> *McGregor v. Campbell* (1909), 19 M. L. R. 38; 11 W. L. R. 153.



## Section 28

The following notes on the subject of set-off are general, being based partly on the provisions of the *English Bankruptcy and Companies Acts*. It must not be assumed that they correctly represent the law under *The Bankruptcy Act* in all of the provinces.

Right to  
set-off must  
be mutual.

The right of set-off must generally<sup>3</sup> be mutual<sup>4</sup>; and a misfeasant can not set off moneys due him from the bankrupt against sums due for misfeasance<sup>5</sup>. 'But where the claims are "mutual" and the justice of the case calls for the right of set-off, the court will go far to ascertain the meaning of obscure enactments and to attach a rational and beneficial meaning to them<sup>6</sup>. There are "mutual dealings" admitting of set-off where the contract on which the trustee sues was entered into before the date of the receiving order, if the property became in equity the property of the purchaser at that time<sup>7</sup>. A director held liable in winding-up proceedings for misappropriation of the companies' money cannot set-off against that liability a debt due from the company<sup>8</sup>. As the parties who initiate or intervene on a taxation are personally liable for the costs of the taxation a trustee in bankruptcy, who by so intervening obtains a reduction in a bill of costs presented against an insolvent, is entitled to an order that the solicitors pay the costs of the taxation to him; and they will not be allowed to set-off this amount against their bill<sup>9</sup>.

No set-off  
against calls  
on shares.

There is no mutuality between the claim of a liquidator of a company against a shareholder for calls, and the claim of a shareholder against the company with respect to matters unconnected with his liability on the shares, and consequently no right of

<sup>3</sup> As to an exception see *Ex parte Eyre* (1841), 2 M. D. & D. 66, and see *Turner v. Thomas* (1871), L. R. 6 C. P. 610; 40 L. J. C. P. 271.

<sup>4</sup> See *Lister v. Hooson* (1908), 1 K. B. 174, where a settlement was set aside.

<sup>5</sup> *Bailey Cobalt Mines, Ltd. v. Benson* (1919), 44 O. L. R. 1.

<sup>6</sup> *Per Jessell. M.R., in Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D. 648 affd. in (1884), 9 A.C. 434; 51 L. J. Q. B. 576.

<sup>7</sup> *In re Taylor ex parte Norvell* (1910), 1 K. B. 562; 79 L. J. K. B. 610; 17 Mans. 145; 54 S. J. 271.

<sup>8</sup> *In re Anglo-French Co-operative Society ex parte Pelly* (1882), 21 Ch. D. 492; *Re Bailey Cobalt Mines, Ltd.* (1919), 44 O. L. R. 1.

<sup>9</sup> *In re Rogers & Farewell* (1890), 14 P. R. 38.



set-off<sup>10</sup>. This rule is subject in England to the exception that where the shareholder, who has a claim against the company becomes bankrupt and the company is being wound up, the debt may be set-off against the calls whether the claim be made in the bankruptcy or in the winding-up<sup>1</sup>. It has also been decided in Canada that section 71 of *The Winding-Up Act* allows a set-off against calls made before the company went into liquidation, there being no such section in the English Act<sup>2</sup>. In an action in which a set-off is pleaded the claim and set-off remain two distinct and separate debts until judgment so that the right of set-off cannot be insisted on by a contributory in winding-up proceedings, even though the defence of set-off had been asserted in an action brought before winding-up<sup>3</sup>.

The right of set-off may have the effect of giving a creditor who can apply it an advantage over other creditors; but so long as there is no fraud on the bankruptcy laws such a transaction cannot be impeached as a fraudulent preference<sup>4</sup>. But where a plaintiff company which is in liquidation and is suing for the value of unspecific goods delivered to the defendant after the commencement of the winding up, in pursuance of a contract entered into before the commencement of the winding up, the defendant will not be allowed to set-off a debt due to him before the

Section 28

Set-off and preference.

<sup>10</sup> *In re Wiarton Beet Sugar Co.* (1905), 10 O. L. R. 219, following the *Liquidators of the Maritime Bank v. Troop* (1890), 16 S. C. R. 456; and not following *In re Mimico, Pearson's Case* (1895), 26 O. R. 289; see also *Grissell's Case* (1866), L. R. 1 Ch. 528. Whether an agreement to allow a shareholder to set-off money or goods due him from the company against a call made before the winding up would be *intra vires*, *quære*: *In re Jones & Moore Electric Co.* (1908), 18 M. L. R. 549; *Calisher's Case* (1868), L. R. 5 Eq. 214; 37 L. J. Ch. 208; *Barnett's Case* (1875), L. R. 19 Eq. 449; 44 L. J. Ch. 233; *Black & Co.'s Case* (1872), L. R. 8 Ch. 254; 42 L. J. Ch. 442; *Consolidated Investments, Ltd., Simon's Case* (1918), 2 W. W. R. 581.

<sup>1</sup> *In re Duckworth* (1867), L. R. 2 Ch. 578; 36 L. J. Bank. 28; *Ex parte Strang* (1870), L. R. 5 Ch. 492; and see *In re Auriferous Properties, Ltd.* (1898), 1 Ch. 691; 67 L. J. Ch. 367; *In re G. E. B.* (1903), 2 K. B. 340; 10 Mans. 243.

<sup>2</sup> *In re Ontario Fire Insurance Co., Heighington's Case* (1915), 10 W. W. R. 911. See *In re Washington Diamond Co.* (1893), 3 Ch. 95; 62 L. J. Ch. 895.

<sup>3</sup> *In re Hiram Maxim Lamp Co.* (1903), 1 Ch. 70; 72 L. J. Ch. 18.

<sup>4</sup> *Stephens v Boisseau* (1896), 26 S. C. R. 437.



**Section 28** commencement of the winding up; for so to do would be to allow the company by a transaction completed after the commencement of the winding up (which transaction is void unless sanctioned by the court), to pay one creditor in full in preference to the others<sup>5</sup>.

Time when mutual relationship must exist.

The right of set-off under *The Winding-Up Act* is limited to such rights as arise from the mutual relations of the company and its creditors or debtors as existent at the commencement of the winding-up proceedings<sup>6</sup>. In the case of bankruptcy, as distinguished from winding up, the date of the receiving order, and not the date of the commencement of the bankruptcy, is the time for ascertaining what mutual debts were existing between the debtor and other persons<sup>7</sup>. At that date there may in England be a right to set-off against the bankrupt, though the sum due to the bankrupt may not be capable of determination for some time<sup>8</sup>.

Debts accruing due.

Section 28(1) does not speak of debts due or accruing due as does the corresponding section in *The Winding-Up Act*. Whatever may be the effect of this it is clear that where a debtor becomes bankrupt, having money on deposit in a bank, and is indebted to the bank on a note under discount which has not matured, the bank is entitled after the maturity of the note to set off its claim under the note against the claim of the trustee to the moneys still remaining on deposit<sup>9</sup>. But where in Quebec a bank becomes insolvent a depositor with money to his credit who is liable to the bank as endorser on a note not yet due has no right to com-

<sup>5</sup> *Ince Hall Rolling Mills v. Douglas Forge* (1882), 8 Q. B. D. 179. Note that in England there is no section exactly corresponding with section 71 of the *Winding-Up Act* 1906, which expressly limits the right of set-off to claims due or accruing due to the company at the commencement of the winding up.

<sup>6</sup> *Croin v. Wade* (1917), 55 S. C. R. 208; per Idington, J., at p. 210. Consider *In re H. E. Thorne & Son, Ltd.* (1914), 2 Ch. 438; and *In re Asphaltic Wood Pavement Co.* (1885), 30 Ch. D. 216, 224; 54 L. J. Ch. 460.

<sup>7</sup> *In re Daintry ex parte Mant* (1900), 1 Q. B. 546; 69 L. J. Q. B. 207; 7 Mans 107. See in the case of a bank, *Maritime Bank v. Robinson* (1866), 26 N. B. R. 297.

<sup>8</sup> *In re Daintry ex parte Mant, supra.*

<sup>9</sup> *Ontario Bank v. Routhier* (1900), 32 O. R. 67.



pensation between the value of the note and a like amount of his deposit<sup>10</sup>. Section 28

As between a bankrupt mortgagor and his mortgagee any claim existing at the date of the receiving order or the execution of the assignment<sup>1</sup>, which would form the subject of a set-off in a common law action on the covenant may be set off by the trustee of the mortgagor against the mortgagee or his assignee<sup>2</sup>. A plaintiff to whom a debt is owing by a defendant who becomes bankrupt *pendente lite* is entitled to set-off the debt due by the defendant against any costs which the defendant may recover<sup>3</sup>. The costs of a trustee in bankruptcy of a defendant stand as regards set-off upon the same footing as the costs of the defendant<sup>4</sup>. There may be cases where though in liquidation proceedings the right of set-off is denied, the right exists to set-off in an action brought<sup>5</sup>.

The right of set-off under *The Bankruptcy Act* exists whether or not at the time the claim was incurred there was knowledge on the part of the person claiming the set-off, of the insolvency or bankruptcy of the debtor<sup>6</sup>. Knowledge of insolvency immaterial.

It has been held that a deed of assignment which provides for the payment of the debts of the debtor "rateably according to the law of bankruptcy and without prejudice or priority", does not import the obligation of allowing a set-off under the mutual dealings section of the Act<sup>7</sup>. Incorporation of bankruptcy provisions in a deed.

Section 28(2) is very similar to section 51(3) in the notes to which the cases are collected. Sec. 28(2).

<sup>10</sup> *Vanier v. Kent* (1902), Q. R. 11 K. B. 373.

<sup>1</sup> *Moody v. Canadian Bank of Commerce* (1891), 14 P. R. 258.

<sup>2</sup> *Court v. Holland* (1881), 29 Gr. 19.

<sup>3</sup> *Brigham v. Smith* (1870), 17 Gr. 512.

<sup>4</sup> *Brigham v. Smith*, *supra*.

<sup>5</sup> *Sovereign Life v. Dodd* (1892), 2 Q. B. 573.

<sup>6</sup> *Hawkins v. Whitten* (1829), 10 B. & C. 217; *Thibaudeau v. Garland* (1896), 27 O. R. 391; and see *Maritime Bank v. Robinson* (1866), 26 N. B. R. 297, and *In re Central Bank, Yorke's Case* (1888), 15 O. R. 625; and see section 100 of *The Dominion Winding-Up Act*, R. S. C. 1906, c. 144.

<sup>7</sup> *Baker v. Adam* (1910), 15 Com. Cases 227. 239.



## Section 29

Avoidance  
of certain  
settlements.

*Settlement and Preferences.*

- 29 (1) Any settlement of property hereafter made, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt or insolvent or makes an authorized assignment within one year after the date of the settlement, be void against the trustee in the bankruptcy or of the assignment and shall, if the settlor becomes bankrupt or insolvent or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.
- (2) Any covenant or contract hereafter made by any person (hereinafter called "the settlor") in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt or makes an

Certain  
marriage  
contracts  
void as  
against  
trustee.



authorized assignment as aforesaid, and the covenant or contract has not been executed at the date of the petition in bankruptcy or said assignment, be void against such trustee except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy or assignment proceedings under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

- (3) Any payment of money hereafter made (not being payment of premiums on a policy of life insurance in favour of the husband, wife, child or children of the settlor) or any transfer of property hereafter made by the settlor in pursuance of such a covenant or contract as aforesaid, shall be void against the trustee unless the person to whom the payment or transfer was made prove either,—
- Payments and transfers void, subject to proof of certain facts.
- (a) that the payment or transfer was made more than six months before the date of the petition in bankruptcy or the date of the authorized assignment; or,
  - (b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or,
  - (c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor;



### Section 29

"Settlement"  
defined.

but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the date of the said petition or assignment.

- (4) "Settlement" shall, for the purpose of this section, include any conveyance or transfer of property.

**Cross References Act:** Recovering proceeds of settlements, 33; discharge when settlement made to defeat or delay creditors, 60; fraudulent conveyance an act of bankruptcy, 3(b); protection of purchasers in good faith, 33; protected transactions, 32; adjudication of bankruptcy, 4(5); relation back of bankruptcy, 4(10); making of A.A., 9; computation of time, 82; fraudulent preference, 31; priority of claims, 51.

**Cross References Rules:** Application to avoid a settlement, 120, 121.

**Analogous Legislation:** English Acts, 1914, s. 42; 1883, s. 47; 1869, s. 91.

### ANALYSIS OF NOTES.

Comparison with English section.

What is meant by "settlement."

Settlements impeachable under 13 Eliz. c. 5.

Settlement made in consideration of marriage.

Purchaser.

In good faith.

Meaning of "void."

Effect of avoidance of settlement.

Settlements impeached within five years from execution.

Comparison  
with English  
section.

This section differs in some respects from its English prototype. The Canadian section refers only to settlements, contracts or payments "hereafter made". The English Act contains no such limitation. Further, while a settlement may be attacked in England only if the settlor becomes bankrupt, it may be attacked in Canada if he becomes bankrupt or insolvent<sup>9</sup>, or if he makes an authorized assignment. The periods of two and ten years within which the settlement may be attacked under the English Act have been shortened to one and five years respectively in section

<sup>8</sup> The Act came into force 1 July, 1920; see section 98.

<sup>9</sup> Insolvent is defined, section 2(t).



29(1); and the period of two years within which a payment of money or a transfer of property will be avoided under the English Act, has been shortened to six months in section 29(3)(a) of *The Bankruptcy Act*. Section 29

To be within section 29(1) the transaction must be in the nature of a settlement, that is a disposition of property to be held for the enjoyment of some person. It may take the form of a conveyance or transfer by the donor which contemplates the retention of the property by the donee<sup>10</sup>, either in its original form or in such a form that it can be traced. It does not extend to a transfer of property which cannot be traced, as for instance, where there is a gift of money to be employed in a business<sup>11</sup> or in the purchase of a business, the money being so employed or spent, and the business itself not being settled<sup>1</sup>. Annual payments for premiums due on a life insurance policy taken out before marriage, but settled after marriage on the wife of the assured, are not "settlements"; nor is a proportionate part of the moneys payable under the policy represented by the payment of these particular premiums<sup>2</sup>. Damages recovered by a husband against a co-respondent under *The English Matrimonial Causes Act* 1857, being entirely in the control of the court which may settle them on the children leaving nothing to the husband, are not when settled a "settlement of property" within the section which may be avoided by the trustee in bankruptcy of the husband<sup>3</sup>. Where the property in the article in question has never been in the alleged settlee there is no settlement, even though he may have had the benefit of the transaction<sup>4</sup>.

<sup>10</sup> *In re Tankard ex parte O. R.* (1899), 2 Q. B. 57; 68 L. J. Q. B. 670; 6 Mans. 188; *In re Vansittart ex parte Brown* (1893), 1 Q. B. 181; 62 L. J. Q. B. 277; 9 Mor. 280.

<sup>11</sup> *In re Plummer* (1900), 2 Q. B. 790; 69 L. J. Q. B. 936; 7 Mans. 367; *In re Player ex parte Harvey* (1885), 15 Q. B. D. 682; 54 L. J. Q. B. 554; 2 Mor. 265; *per Rigby, L.J.*, *In re Plummer* (1900). *supra*, and see *Lister v. Hooson* (1908), 1 K. B. 174; 77 L. J. K. B. 161; 15 Mans. 17.

<sup>2</sup> *In re Harrison and Ingram ex parte Whinney* (1900), 2 Q. B. 710; 69 L. J. Q. B. 942; 7 Mans. 378.

<sup>3</sup> *In re Stephenson ex parte Brown* (1897), 1 Q. B. 638; 66 L. J. Q. B. 423; 4 Mans. 13.

<sup>4</sup> *In re Branson ex parte Moore* (1914), 3 K. B. 1086; 83 L. J. K. B. 1673; 21 Mans. 229.



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While a man may not by contract or otherwise qualify his own interest by a condition determining or controlling it in the event of his bankruptcy to the prejudice of his creditors, he may make a sale of his property taking back a covenant for the discharge of his debts and the payment of an annuity defeasible on bankruptcy; such a sale is not a settlement nor will it be set aside under 13 Eliz. c. 5, if made *bona fide*, for good consideration and not for the purpose of hindering or defrauding creditors<sup>5</sup>.

Settlements  
impeachable  
under 13  
Eliz. c. 5.

Settlements which cannot be impeached within the time limited in this section can often be impeached under 13 Eliz. c. 5. It is not proposed here to discuss the numerous cases on that Statute. They are fully treated in May on Fraudulent and Voluntary Dispositions of Property. The principle of the Statute is that there must be bad faith, that is an intention on the part, not of the settlor, but of the vendor in that character, to cheat or delay his creditors in their demands<sup>6</sup>. The illegal intent is a question of fact for the jury or a judge sitting as a jury<sup>7</sup>. The Statute of Elizabeth was meant, for example, to prevent a man making a voluntary settlement of all his property immediately before going into a hazardous business, the object being "If I succeed in business I make a fortune for myself. If I fail I leave my creditors unpaid"<sup>8</sup>. Under that Statute purchasers for value without notice are protected, and this phrase includes persons who have without notice of the fraudulent character of the settlement purchased an interest whether legal or equitable, which is derived under it<sup>9</sup>.

<sup>5</sup> *Denny's Trustee, Denny v. Warr* (1919), 1 K. B. 583; 88 L. J. K. B. 679; (1918-19), B. & C. R. 139, following *In re and ex parte Eyre* (1881), 44 L. T. 922; and see *In re Tetley ex parte Jeffery* (1896), 66 L. J. Q. B. 111; 3 Mans. 226, 321.

<sup>6</sup> *Ex parte Eyre, supra*.

<sup>7</sup> *Glegg v. Bromley* (1912), 3 K. B. 474, 492; 81 L. J. K. B. 1081; *Denny v. Denny & Warr* (1919), *supra*, at 591.

<sup>8</sup> *Ex parte Russell in re Butterworth* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; *Mackay v. Douglas* (1872), L. R. 14 Eq. 106; 41 L. J. Ch. 529; *Lai Hop v. Jackson* (1895), 4 B. C. R. 168. See as to onus of proof in the case of transfers between relatives, *Imperial Bank v. McLellan* (1919), 12 S. L. R. 415.

<sup>9</sup> *Halifax Joint Stock Banking Co. v. Gledhill* (1891), 1 Ch. 31; 60 L. J. Ch. 181; 63 L. T. 623.



The section does not purport to avoid settlements made before and in consideration of marriage<sup>10</sup>. But where a marriage is entered into solely for the purpose of making a settlement valid, which otherwise would be void, the settlement will be set aside at the instance of the settlor's trustee in bankruptcy<sup>1</sup>. If, however, the object of the marriage is not solely for the purpose of preserving the property comprised in the settlement, but for the ordinary reasons which lead men and women to marry, the settlement will not be void<sup>2</sup>, and such a settlement may contain a covenant to transfer to the trustee of the settlement all after-acquired property except business assets<sup>3</sup>.

Section 29

Settlements made in consideration of marriage.

A settlement by a widower on remarriage is voluntary as regards a daughter by a previous marriage interested therein<sup>4</sup>, and a deed supplemental to an ante-nuptial settlement may be voluntary as regards the wife<sup>5</sup>.

Section 29(1) likewise protects settlements made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. The term "purchaser" as so used is not limited to a purchaser in the mercantile sense, viz.: a person who has bought something by contract and sale; but it extends to a case where a father and son join in settling certain of the property of each of them on the son's children<sup>6</sup>.

Purchaser.

<sup>10</sup> A life interest in an antenuptial settlement of a man's own property may not be made defeasible on bankruptcy, for that would be against the policy of the bankruptcy laws. See *Burroughs-Fowler* (1916), 2 Ch. 251; (1916), H. B. R. 108. The forfeiture in such case will not operate as between the debtor and his trustee, but it will operate as between the debtor and third parties entitled to benefit on the forfeiture, S. C. See for an example of a properly drawn settlement limiting husband's property for life and other property till bankruptcy: *In re Winwood's Settlement*, *Fisher v. Trustee* (1916), H. B. R. 158.

<sup>1</sup> *In re and ex parte Pennington* (1888), 5 Mor. 216, 268; *Bulmer v. Hunter* (1869), L. R. 8 Eq. 46; 38 L. J. Ch. 543; *Colombine v. Penhall* (1853), 1 Sm. & Giff. 228.

<sup>2</sup> *In re and ex parte Pennington*, *supra*; *Fallis v. Wilson*, 15 O. L. R. 55.

<sup>3</sup> *In re Reis ex parte Clough* (1904), 2 K. B. 769; 73 L. J. K. B. 929; 11 Mans. 229.

<sup>4</sup> *Carruthers v. Peake* (1911), 55 S. J. 291.

<sup>5</sup> *In re Macdonald* (1919), 88 L. J. K. B. 1226.

<sup>6</sup> *Hance v. Harding* (1888), 20 Q. B. D. 732, 738; 57 L. J. Q. B. 403; *In re Tetley ex parte Jeffrey* (1896), 66 L. J. Q. B. 111; 3 Mans. 226. 321; *Mackintosh v. Pogose* (1895), 1 Ch. 505; 64 L. J. Ch. 275; 2 Mans. 27.



## Section 29

In good faith.

In order to constitute "good faith" within this section it is sufficient if there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith<sup>7</sup>. The words "good faith" must be taken to mean without notice that any fraud or fraudulent preference is intended<sup>8</sup>.

Meaning of "void."

Void in this section means voidable<sup>9</sup> as against the donee under the settlement, but not as against a purchaser in good faith for fair and reasonable consideration from such donee<sup>10</sup>, who has no notice of the insolvency of the debtor<sup>1</sup>. Such a purchaser will be protected not only when he purchases before the commencement of the title of the trustee<sup>2</sup>, but also when having no notice of an act of bankruptcy he purchases after the time to which it relates back<sup>3</sup>. On the same principle trustees of a settlement originally valid<sup>4</sup>, but which becomes void on the bankruptcy of the settlor are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees<sup>5</sup>.

Effect of avoidance of settlement.

Subject to the provisions of section 33, the effect of an order declaring a settlement to be void as against the trustee in bankruptcy or authorized assignment proceedings is not to vest the property comprised in

<sup>7</sup> *Mackintosh v Pogose*, *supra*; *In re Tetley ex parte Jeffrey*, *supra*.

<sup>8</sup> *Butcher v. Stead* (1875), L. R. 7 H. L. 839; 44 L. J. Bank, 126; as cited in *Mackintosh v. Pogose*, *supra*.

<sup>9</sup> *In re Brall ex parte Norton* (1893), 2 Q. B. 381; 62 L. J. Q. B. 457; 10 Mor. 166.

<sup>10</sup> See section 33 and *Re Vansittart ex parte Brown* (1893), 2 Q. B. 377; 62 L. J. Q. B. 279; 10 Mor. 44; *In re Naylor ex parte Stephenson* (1893), 62 L. J. Q. B. 460; 10 Mor. 173.

<sup>1</sup> *In re Brall ex parte Norton*, *supra*; *In re Shrager* (1913), 108 L. T. 346.

<sup>2</sup> *In re Carter & Kenderdine's Contract* (1897), 1 Ch. 776; 66 L. J. Ch. 408; 4 Mans. 34.

<sup>3</sup> *In re Hart ex parte Green* (1912), 3 K. B. 6; 81 L. J. K. B. 1213; 19 Mans. 334, and see *In re Shrager* (1913), 108 L. T. 346; see *Wilkes v. Bodington* (1707), 2 Vern. 599, quoted by Cozens-Hardy, M.R., in *In re Hart ex parte Green* at p. 11. *Wilkes v. Bodington* was decided when there was no section similar to section 32, which protects persons dealing in good faith with the bankrupt during the period covered by the relation back of the title of trustee.

<sup>4</sup> See where the trustee must have known that the settlement was invalid: *Smith v. Dresser* (1866), L. R. 1 Eq. 651; 35 L. J. Ch. 385.

<sup>5</sup> *In re Holden ex parte O. R.* (1887), 20 Q. B. D. 43; 57 L. J. Q. B. 47.



the settlement in the trustee as against persons who claim to be incumbrancers or mortgagees outside the bankruptcy; but it would seem that the effect of such an order is to accelerate subsequent incumbrancers generally<sup>6</sup>, that is to say, a settlement which is void as against the trustee is void altogether<sup>7</sup>, to the extent necessary for satisfying the debts of the bankrupt and the costs of the bankruptcy,<sup>8</sup> and the trustees of the settlement will be ordered to hand over the settled property to the trustee in bankruptcy without prejudice to an application by them to have the surplus of the settled property handed back to them<sup>9</sup>.

Where a person becomes bankrupt or insolvent or makes an authorized assignment within five years from the date of the settlement, he or those claiming under the settlement must prove, in order to uphold the settlement:—

Settlements impeached within five years from execution.

(a) That the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement. This clause has been construed to mean “without the aid of the property which by the settlement passes to others”, it having been held that the life interest which the settlor reserved to himself may be taken into account in estimating his solvency<sup>10</sup>. In determining whether the settlor was able to pay all his debts at the time of the settlement the value of the implements of his trade and the good will of his business if taken into account at all may only be given such value as would be realized at a forced sale<sup>1</sup>.

(b) That the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof. What the law intends to prevent by this requirement is a settlement to operate *in futuro*,

<sup>6</sup> *Sanguinette v. Stuckley's Banking Co.* (1895), 1 Ch. 176; 64 L. J. Ch. 181; 1 Mans. 477.

<sup>7</sup> *In re Farnham* (1895), 2 Ch. 799; 64 L. J. Ch. 717; 3 Mans. 109.

<sup>8</sup> *In re Sims ex parte Sheffield* (1896), 3 Mans. 340.

<sup>9</sup> *In re Sims ex parte Sheffield* (1896), 3 Mans. 340.

<sup>10</sup> *In re Lowndes ex parte Trustee* (1887), 18 Q. B. D. 677; 56 L. J. Q. B. 425; 4 Mor. 139.

<sup>1</sup> *Ex parte Russell in re Butterworth* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521.



**Section 30** a covenant for instance to settle specific property, which the trustees could have enforced against the trustee in the case of the settlor's bankruptcy; and not to a case where, no matter how solvent the settlor was, some of the settled property passed directly to certain of the beneficiaries without the intervention of the trustees appointed to preserve the interest of the remaining beneficiaries<sup>2</sup>.

A document in the form of an actual assignment of property not yet in possession may be read as a covenant or contract to assign within section 29(2)<sup>3</sup>.

Where the settlor has some estate or interest in the property included in the covenant, that estate or interest protects from the future trustee in bankruptcy only the property to which it extends (at least where the interest clearly extends only to a severable portion of the property)<sup>4</sup>.

The settlor has an interest in property which will take it out of the net spread by section 29(2), provided the interest ultimately materialises by any title, even though that title be other than that which the settlor had at the date of the marriage<sup>5</sup>.

The difference in language between section 29(2) and section 91 of the English Act of 1869 (32 & 33 Vic. c. 71), probably makes the case of *in re Tonnies, ex parte Bishop*<sup>6</sup> no longer an authority for the proposition that a covenant for the payment of a sum of money not specifically earmarked is outside section 29(2).

Avoidance  
of general  
assignment  
of book  
debts.

30. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part

<sup>2</sup> *In re Lowndes ex parte Trustee, supra*.

<sup>3</sup> *In re Bulteel's Settlements, Bulteel v. Manley* (1917), 1 Ch. 251; 86 L. J. Ch. 294; (1917), H. B. R. 105.

<sup>4</sup> *In re Bulteel's Trusts, Bulteel v. Manley, supra*. As to what is estate or interest, see *In re Andrews' Trusts* (1878), 7 Ch. D. 635.

<sup>5</sup> *In re Bulteel's Settlements, Bulteel v. Manley, supra*, distinguishing *Sweetapple v. Horlock*, 11 Ch. D. 745; 48 L. J. Ch. 660; *Lovett v. Lovett* (1898), 1 Ch. 82; 67 L. J. Ch. 20.

<sup>6</sup> (1873). L. R. 8 Ch. 718; 42 L. J. Bank. 107. The case is, however, cited in Williams, 12th ed., p. 292.



thereof, and is subsequently adjudicated bankrupt or makes an authorized assignment, the assignment of book debts shall be void against the trustee in the bankruptcy or under the authorized assignment, as regards any book debts which have not been paid at the date of the presentation of the petition in bankruptcy or of the making of the authorized assignment, unless there has been compliance with the provisions of any statute which now is or hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts, due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bona fide* and for value, or in any authorized assignment.

- (2) For the purposes of this section “assignment” includes assignment by way of security and other charges on book debts. “Assignment” defined.

**Cross References Act:** Adjudication of bankruptcy, 4(5); relation back of bankruptcy, 4(10); compare, 29; making of A.A., 9; compliance with provincial Acts, *cf.*, 3(h).

**Cross References Rules:** Presentation of petition, 76.

**Analogous Legislation:** English Act, 1914, s. 43; 1913, s. 14; *cf.* *The Bank Act (Canada)*, 1913, c. 9, s. 88(13) to (16).

Section 30(1) is in the form in which it was enacted by section 25 of *The Bankruptcy Act Amendment Act*, 1921<sup>7</sup>.

<sup>7</sup> The previous section read:—

30(1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts, or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorized assignment, the assignment of book debts shall be void against the trustee in the bankruptcy, or under the authorized assignment, as regards any book debts which have not been paid at the



## Section 30

The deletion of the words "to any other person" from the original section was no doubt intended to avoid the contention that section 30 was not intended to apply to banks, it being possible the word "person" as defined in section 2(*aa*) did not include banks.

There is some professional difference of opinion on the meaning to be given to section 30(1). There are those who are of the opinion that the section avoids all general assignments of book debts, except in provinces where there is statutory provision for the registration notice and publication of such assignments, and where the provincial law has been complied with. On the other hand there are those who maintain that the section does not avoid general assignments of book debts where there is no local law requiring registration notice and publication.

It is considered that the second is the sounder opinion. If this is the correct view, it is another illustration of the fact that Parliament has refrained as much as possible from altering provincial law, even though under the ancillary doctrine Parliament would be competent so to legislate. Other instances will be found in which *The Bankruptcy Act* is superimposed on provincial law. Such a system permits of provincial freedom in matters which have hitherto been within the provincial sphere.

Book debts are *choses in action*. In the past *choses in action* have either been expressly excepted from the Provincial Bills of Sale Acts, or they have been impliedly excluded by the use of such phrases as "goods and chattels", which do not include *choses in action*. The same rule formerly prevailed in England; but the English *Bills of Sale Act* has been amended so as to bring book debts within the Act.

date of the petition in bankruptcy or of the authorized assignment, unless there has been compliance with the provisions of any Statute which now is or at any time hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts, due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bona fide* and for value, or in any authorized assignment.



This legislation has been followed in British Columbia Section 30 where there is now an *Assignment of Book Accounts Act*, and in Saskatchewan<sup>8</sup>.

Section 30(1) has no reference to Provincial Acts which provide that the legal right to a debt shall pass where there is an absolute assignment in writing (not purporting to be by way of charge only) of a debt or other legal *chose in action* with express notice in writing to the debtor<sup>9</sup>.

In provinces therefore in which there is no provincial statute similar to the British Columbia *Assignment of Book Accounts Act*, it is submitted that an equitable or "legal" assignment of book debts will be good as against the trustee in bankruptcy, even when it is made after the date of the presentation of the petition, provided it falls within the protection of section 32, and provided it is not a fraudulent preference, or given under circumstances which raise an estoppel<sup>10</sup>.

<sup>8</sup> See B. C. 1916, c. 5, amended 1917, c. 6; 1918, c. 8; 1920, c. 7; *Saskatchewan Chattel Mortgage Act*, R. S. S. c. 200, s. 13. As for provincial *Bills of Sales Acts* which expressly except from their operation *choses in action*, see N. S. 1918, c. 11, s. 2(b); C. S. N. B. 1903, c. 142, s. 28; R. S. B. C. 1911, c. 20, s. 3. For interpretation of the phrase "goods and chattels," see per Armour, C.J., in *Thibaudeau v. Paul* (1894), 26 O. R. 385, at 389; per Teetzel, J., in *National Trust v. Trusts and Guarantee* (1912), 26 O. L. R. 279, and see *Kitching v. Hicks* (1884), 6 O. R. 739; *Tailby v. O. R.* (1888), 13 A. C. 523. Compare R. S. O. 1914, c. 135, ss. 5, 8; R. S. M. 1913, c. 17, ss. 3, 5; R. S. S. 1909, c. 144, s. 7. The interpretation given to the phrase "goods and chattels" in such Acts should not be confused with that given to the phrase when used in wills: *In re McGarry* (1909), 18 O. L. R. 525. Apart from Statute there is no duty on a bank which has received a general assignment of book debts to notify other creditors of the debtor to this effect: *Bank of British North America v. Wood* (1910), 14 W. L. R. 34. See as to Quebec Civil Code, Articles 1570 to 1578, and Art. 2127. The law in Quebec previous to coming into force of *The Bankruptcy Act* was similar to that in the French commercial code under which the assignee in assignment proceedings occupied a higher position than does the trustee in bankruptcy. In Quebec he was in the position of a third party who could take advantage of Article 1571 as against the purchaser of a debt or right of action who had not taken the necessary steps to complete his title as against third parties: *Dominion Bank v. Ayling, Ryan & Hart* (1917), 26 Que. K. B. 75. Contrast *Thibaudeau v. Paul* (1895), 26 O. R. 385.

<sup>9</sup> See for an example of such an Act, R. S. O. 1914, c. 109, s. 49. This and similar provincial enactments were originally taken from the English *Judicature Act* 1873, 36 & 37 Vic. c. 66, s. 25(6). They do not forbid or destroy equitable assignments or impair their efficacy: *Brandts v. Dunlop Rubber Co.* (1905), S. C. 454, 461; 74 J. A. B. 898.

<sup>10</sup> There is no reputed ownership clause in the *Bankruptcy Act*.



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Law with respect to assignments of future choses in action previous to passing of sec. 30(1).

Watson, L.J., in *Tailby v. O. R.*<sup>11</sup>, speaking of the law in England when no section analogous to section 30 of *The Bankruptcy Act* had been passed, said: "The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of *The Bills of Sale Acts*, and though not yet existing may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, that is that on its coming into existence it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty the beneficial interest will immediately vest in the assignee . . . In the case of book debts as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor"<sup>12</sup>.

Such cases therefore as *Rutter v. Everett* (1895), 2 Ch. 872; 64 L. J. Ch. 845; 2 Mans. 371; *In re Neal* (1914), 2 K. B. 910; 83 L. J. K. B. 1118; 21 Mans. 164, are inapplicable.

<sup>11</sup> (1888), 13 A. C. 523, 533; 58 L. J. Q. B. 75.

<sup>12</sup> See where the assignment was insufficiently defined: *Jones v. Humphreys* (1902), 1 K. B. 10; 71 L. J. K. B. 23. An assignment of book debts will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account: *In re White & Co. ex parte O. R.* (1884), 1 Mor. 77. A bill entered in the books of the debtor as a receivable bill is a book debt: *Dawson v. Isle* (1906), 1 Ch. 633; 75 L. J. Ch. 338.



31. (1) Every conveyance or transfer of pro- Section 31  
 perty or charge thereon made, every pay-  
 ment made, every obligation incurred, and Avoidance  
of preference  
in certain  
cases.  
 every judicial proceeding taken or suffered  
 by any insolvent person in favour of any  
 creditor or of any person in trust for any  
 creditor with a view of giving such creditor  
 a preference over the other creditors shall,  
 if the person making, incurring, taking,  
 praying or suffering the same is adjudged  
 bankrupt on a bankruptcy petition pre-  
 sented within three months after the date  
 of making, incurring, taking, paying or  
 suffering the same, or if he makes an autho-  
 rized assignment, within three months after  
 the date of the making, incurring, taking,  
 paying or suffering the same, be deemed  
 fraudulent and void as against the trustee  
 in the bankruptcy or under the authorized  
 assignment.
- (2) If any such conveyance, transfer, pay- When view  
to prefer  
presumed  
*prima facie*.  
 ment, obligation or judicial proceeding has  
 the effect of giving any creditor a prefer-  
 ence over other creditors, or over any one  
 or more of them, it shall be presumed *prima*  
*facie* to have been made, incurred, taken,  
 paid or suffered with such view as aforesaid  
 whether or not it was made voluntarily or  
 under pressure and evidence of pressure  
 shall not be receivable or avail to support  
 such transaction.
- (3) For the purpose of this section, the ex- Creditor  
defined.  
 pression "creditor" shall include a surety or  
 guarantor for the debt due to such credi-  
 tor.

**Cross References Act:** Insolvent defined, 2(*t*); fraudulent preference an act of bankruptcy, 3(*c*); certain purchasers in good faith protected, 33; fraudulent preference after arrest, 55(2).

**Analogous Legislation** Canadian Acts, 1875, s. 133; 1869, s. 89; 1864, s. 8(4).

English Acts, 1914, s. 44; 1883, s. 48; 1869, s. 92.

*Dominion Winding-up Act* (1906), c. 144, s. 98.



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Provincial Assignments Acts, R. S. O. 1914, c. 134, s. 5(2) (3) (4) (5); R. S. M. 1913, c. 12, s. 38; Alberta, 1907, c. 6, s. 38; R. S. N. B. c. 141; s. 2 (2) (3) (4) (5); P. E. I. 1898, c. 4, s. 2.  
Civil Code of Quebec, Art. 2023.

## ANALYSIS OF NOTES.

What is a fraudulent preference is determined by the words of the section.

Transactions can only be impeached within three months.

Preference after date of petition.

Set off no preference.

Doctrine of fraudulent preference not invoked for benefit of single creditor or class.

Whether trustee must prove that creditor had knowledge of the intent and also of the insolvency of the debtor.

Law under Assignments Acts.—

Two points in which Bankruptcy Act differs from Assignments Acts.

First point: The innocence of the preferred creditor will not validate the preference.

Second point: Preference exists when made "with a view of giving a preference."

Meaning of "with a view of giving a preference."

Pressure.

Fraudulent preference can only be given by an insolvent.

Effect of section 31(2).

Cases where the view is not a view to give a preference.

- (a) A sense of binding obligation.
- (b) Charge given in pursuance of previous agreement.
- (c) Payments in the ordinary course of business.
- (d) Payment to a secured creditor.
- (e) Payment of regular allowance.
- (f) Revivor of debt.

Other circumstances which put the transaction outside fraudulent preference.

- (a) Transaction must be with reference to debtor's own property.
- (b) Money clothed with trust.

Transactions which may be fraudulent preferences.

- (a) Payments made.
- (b) Judicial proceedings taken or suffered.

What is not a fraudulent preference may be a fraudulent transfer or a common law fraud or fall within 13 Eliz. c. 5.

Evidence of other acts.

Meaning of "creditor."

This is the section substituted by 10 Geo. V. c. 34, s. 8, for section 31 of *The Bankruptcy Act*<sup>13</sup>. It differs

Avoidance of preference in certain cases.

<sup>13</sup> The previous section read: "31(1). Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors or which has the effect of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incur-



in an important respect from the corresponding English section, in that sub-section 31(2) purports to do away with the doctrine of pressure<sup>14</sup>. The English sub-section protecting a person who makes title in good faith and for valuable consideration through or under a creditor of a bankrupt finds its counterpart in section 33.

Apart from the Bankruptcy Act, a conveyance to a creditor with a view to giving him a preference is unimpeachable both at common law and under the Statute of Elizabeth.<sup>15</sup>

The transaction can only be impeached in the period mentioned in the section<sup>1</sup>. The day on which the petition is presented is excluded in calculating the

What is a fraudulent preference is determined by the words of the section.

Transactions can only be impeached within three months.

ring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, if made, incurred, taken, paid or suffered with such view as aforesaid, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment, or if it has such effect as aforesaid be presumed *prima facie* to have been made with a view of giving such creditor a preference over the other creditors, whether it was made voluntarily or under pressure, and if held to have been made with such view, be deemed fraudulent and void as aforesaid.

(2) For the purposes of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor."

"Creditor" defined.

<sup>14</sup> Under the corresponding section of *The Dominion Insolvency Act* of 1875 the doctrine of pressure was excluded: *Davidson v. Ross* (1876), 24 Gr. 22, overruling *Campbell v. Barrie*, 31 U. C. Q. B. 279; *Archibald v. Haldan* (1871), 31 U. C. Q. B. 295; *MacFarlane v. McDonald*, 21 Gr. 319; *Keays v. Brown*, 22 Gr. 10.

<sup>15</sup> *Ex parte Games re Bamford* (1879), 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744; *Glegg v. Bromley* (1912), 3 K. B. 474, 485, 492; 81 L. J. K. B. 1081; 106 L. T. 625; *Middleton v. Pollock* (1876), 2 Ch. D. 104, 108, 109; *Alton v. Harrison* (1869), L. R. 4 Ch. 622; 28 L. J. Ch. 669. The earlier statutes relating to bankruptcy contained no provision invalidating payments made prior to the act of bankruptcy; but the courts, from the time of Lord Mansfield, held that if a trader in contemplation of bankruptcy with a view to evade the bankruptcy law, preferred a particular creditor to the detriment of the rest, such a preference was a fraud upon the law. Lord Ellenborough in *Crosby v. Crouch* (1809), 2 Camp. 166, 168; 11 East, 256, called this an "excess on the bankruptcy laws." See *per Cockburn, C.J.*, in *Bills v. Smith* (1865), 34 L. J. Q. B. 68, 70; 12 L. T. 22; 6 B. & S. 314.

<sup>1</sup> *Ex parte Games in re Bamford*, *supra*; *In re and ex parte Harvey* (1890), 7 Mor. 138; *In re Liverpool & London Guarantee Co.* (1880), 30 W. R. 378; 46 L. T. 54; 30 W. R. 378 *per Phillimore, J.*, in *In re Ramsay ex parte Deacon* (1913), 2 K. B. 80; 82 L. J. K. B. 526; 108 L. T. 495; 20 Mans. 15. Unless under our Act it may be avoided as an act of bankruptcy. See notes to section 3.



**Section 31** three months<sup>2</sup>. For the purpose of deciding what transactions or parts of transactions fall within this period, the days are to be treated as whole days<sup>3</sup>.

The transaction may be impeached on summary application under Rule 120.

Preference  
after date of  
petition.

Where the fraudulent preference takes place between the date of the presentation of the petition and the making of the receiving order, the section does not apply; but such a transaction is apart from Statute a fraud against the policy of the bankruptcy laws and cannot stand<sup>4</sup>.

Set-off no  
preference.

A set-off which falls within section 28(1) of the Act is not a fraudulent preference even though the effect is to prefer<sup>5</sup>.

Doctrine of  
fraudulent  
preference  
not invoked  
for benefit of  
single credi-  
tor or class.

The doctrine of fraudulent preference cannot be enforced for the benefit of a single creditor or class of creditors<sup>6</sup>, and this applies in the winding up of companies<sup>7</sup>. Therefore a creditor whose sole claim is based on the fraudulent provisions section of the Act may neither take proceedings in his own name, nor may he take them in the name of the trustee<sup>8</sup>.

Whether  
trustee must  
prove that  
creditor had  
knowledge  
of the intent  
and also of  
the insolv-  
ency of the  
debtor.

In deciding whether a transaction can be impeached as a fraudulent preference under section 31 of *The Bankruptcy Act*, two very important matters have first to be determined, namely whether the law under that section requires proof that:—

(a) the preferred creditor had knowledge of the fraudulent intent of the debtor, and

(b) that the preferred creditor had knowledge of the insolvency of the debtor.

The law as it was developed in Ontario under suc-

<sup>2</sup> *Ex parte O. R. in re Dawes* (1897), 4 Mans. 117.

<sup>3</sup> *In re and ex parte Harvey* (1890), 7 Mor. 138.

<sup>4</sup> *In re Badham ex parte Palmer* (1893), 69 L. T. 356; 10 Mor. 252; see *Ex parte Waller in re Dunkley* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 12 Mans. 384.

<sup>5</sup> *In re Washington Diamond Mining Co.* (1893), 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27. Where a debtor has leased his property to a creditor at a fair rent the setting-off of the rent due against the debt due is not a fraudulent preference: *Smith v. Lawrence* (1891), 27 C. L. J. 116.

<sup>6</sup> *Ex parte Cooper in re Zucco* (1875), L. R. 10 Ch. 510; 44 L. J. Bank. 121.

<sup>7</sup> *Willmott v. London Celluloid Co.* (1887), 34 Ch. D. 147; 56 L. J. Ch. 89; 55 L. T. 696.

<sup>8</sup> *Ex parte Cooper in re Zucco, supra.*



cessive Assignments and Preferences Acts, which were enacted in similar terms in other Provincial jurisdictions, required proof of both the above mentioned facts; unless on proof of the first the conclusion was that the creditor must have had knowledge of the second.

Section 31  
Law under  
Assignments  
Acts.

In the leading case of *Johnson v. Hope*<sup>9</sup>, the Court of Appeal for Ontario decided that it must be shown that the grantee had knowledge or notice of the embarrassed condition of the debtor before a transaction could be avoided as a fraudulent preference under the Ontario Act. This decision was not accepted without evidence of strong judicial opinion to the contrary<sup>10</sup>, but has since been followed<sup>1</sup>.

*Johnson v. Hope*<sup>2</sup> also decided that where the creditor deals *bona fide* with the debtor, that is to say where there is no "concurrence of intent" the transaction cannot be impeached as a fraudulent preference; and this is now the law, although it was not until 1905 that there was a decision to this effect in the Supreme Court of Canada<sup>3</sup>.

There are two outstanding points of difference between the provisions of *The Bankruptcy Act* with

<sup>\*</sup> (1889) 17 O. A. R. 10, followed in *Ashley v. Brown* (1889), 17 O. A. R. 500; and see under the Act of 1869 *Rickaby v. Bell* (1878), 2 S. C. R. 560.

<sup>10</sup> See *per* Hagarty, C.J.O., in *Gibbons v. McDonald* (1890), 18 O. A. R. 159, 161; *per* Osler, J.A., S.C., at 165; and *per* Street, J., in the same case in (1890), 19 O. R. 290, 293; see also *Lamb v. Young* (1890), 19 O. R. 290, 293, and see also S. C. 105, and *per* Killam, C.J., in *Schwartz v. Winkler* (1901), 13 M. L. R. 493, 505.

<sup>1</sup> *Baldocchi v. Spada* (1907), 38 S. C. R. 577; 8 O. W. R. 705; 7 O. W. R. 325; *Dana v. McLean* (1901), 2 O. L. R. 466; *Desmarteau v. Dingman* (1908), 11 O. W. R. 111; *Benallack v. Bank of B. N. A.* (1905), 36 S. C. R. 120.

<sup>2</sup> *Supra*.

<sup>3</sup> *Benallack v. The Bank of British North America* (1905), 36 S. C. R. 120, 128; *Baldocchi v. Spada* (1907), 38 S. C. R. 577, 578; 8 O. W. R. 705; 7 O. W. R. 325; and see *per* Ritchie, C.J., in *Gibbons v. McDonald* (1892), 20 S. C. R. 587, 589; *per* Beck, J., in *Tudhope v. Northern Bank* (1909), 10 W. L. R. 122; *Smith v. Sugarman* (1909), 12 W. L. R. 585, 586; *revid.* 13 W. L. R. 671; *restored* 47 S. C. R. 392; and *per* Harvey, J., in *Ross Bros., Ltd. v. Pearson* (1905), 1 W. L. R. 338, 342, 575; *Desmarteau v. Dingman* (1908), 11 O. W. R. 111, 113; *Langley v. Palter* (1909), 13 O. W. R. 951; *Tudhope v. Northern Bank* (1909), 10 W. L. R. 122; see *contra*, *per* Killam, C.J., in *Schwartz v. Winkler* (1901), 13 M. L. R. 393; and see generally *Ashley v. Brown* (1890), 17 O. A. R. 504; *McRoberts v. Steinhoff*, 11 O. R. 369, 372; *Barnes v. McKay*, 10 O. R. 167.



## Section 31

Two points in which Bankruptcy Act differs from Assignments Acts.

First point: the innocence of the preferred creditor will not validate the preference.

respect to fraudulent preferences and the provisions of the Statutes and Ordinances on which *Johnson v. Hope*<sup>4</sup> and succeeding cases were decided; and there is one feature common to *The Bankruptcy Act* and the various Assignments and Preferences Acts, which is not found in *The English Bankruptcy Act*.

The first point of difference is the provision in section 3(1) of R. S. O. 1887, c. 124, on which *Johnson v. Hope* was decided, to the effect that nothing in the fraudulent preference section shall apply to "any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties." This may be compared with the last clause in section 92 of the English Act of 1869, which read: "but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration." It was held in the leading case of *Butcher v. Stead*<sup>5</sup> that this clause had the effect of protecting a creditor who was ignorant that he was being preferred<sup>6</sup>.

As it was no doubt considered that while there might be a hardship in avoiding a transaction which gave an advantage to an innocent creditor, still there was hardship on the other innocent creditors who might be deprived of all possibility of dividends if the transaction were allowed to stand, the law in England was altered after the decision in *Butcher v. Stead*, and section 48(2) of the Act of 1883 was passed on the report of the Select Committee of 1880. Section 48(2) of the Act of 1883 is now section 44(2) of the Act of 1914, which reads: "This section shall not affect the rights of any person making title in good faith through or under a creditor of a bankrupt". Section 44(2) of the English Act may be compared with section 33 of

<sup>4</sup> *Ubi supra*.

<sup>5</sup> (1875), L. R. 7 H. L. 839; 44 L. J. Bank. 126.

<sup>6</sup> See *per Cairns, L.C., S.C.*, at p. 846.

"The section, however, contains at the end of it a provision which appears to me to introduce a new ingredient into the consideration of fraudulent preferences." Before the Act of 1869 if a payment had been made of a debt without pressure and in contemplation of bankruptcy, it would have been a fraudulent preference even though the person receiving the payment did not know that he was being fraudulently preferred."



*The Bankruptcy Act.* The effect of section 32 should not be overlooked, when considering the general scheme of *The Bankruptcy Act* with respect to the avoidance of fraudulent conveyances. Section 31

The second point of difference between section 31 and the section on which *Johnson v. Hope* was decided is that section 31 speaks of a conveyance made "with a view of giving" a creditor a preference, while section 2 of R. S. O. 1887, c. 124, speaks of a conveyance made "with intent" to give a creditor a preference. The distinction would be perhaps immaterial were it not for what might almost be called the secondary meaning which has been read into the words "with intent", so that now "concurrent intent" must be proven. There is no such secondary meaning attached in England to the phrase "with a view of giving a preference".

The leading case on what is meant by "with a view of giving a preference" is *New, Prance & Garrard v. Hunting*<sup>7</sup> in which the decisions of Vaughan-Williams, J., and of the Court of Appeal were affirmed by the House of Lords, *sub nom Sharp v. Jackson*<sup>8</sup>. Halsbury, L.C., put the matter thus: "The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose"<sup>9</sup>. Lord Shand rejected the distinction made by Vaughan-Williams between view and motive<sup>10</sup>, stating that what

Second point: preference exists when made "with a view of giving a preference."

Meaning of "with a view of giving a preference."

<sup>7</sup> (1897), 1 Q. B. 607; (1897), 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 4 Mans. 103.

<sup>8</sup> (1899), A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Mans. 264.

<sup>9</sup> S. C., at pp. 421, 422. The court will look at the real intentions of the debtor and not the actual results of his action: *In re and ex parte Tweedale* (1892), 2 Q. B. 216; 61 L. J. Q. B. 505; 66 L. T. 233; 9 Mor. 110; *Bills v. Smith* (1865), 34 L. J. Q. B. 68; 6 B. & S. 314; 12 L. T. 32; *per Lopes, L.J.*, in *Ex parte Taylor in re Goldsmid* (1886), 18 Q. B. D. 285, at 302; 56 L. J. Q. B. 195; and *per Killam, C.J.*, in *Codville v. Fraser* (1902), 14 M. L. R. 12, 23, 24, citing *Gibson v. Boutts* (1836), 3 Sc. 229; *Ex parte Bumpstead in re McInnes* (1891), 8 T. L. R. 14; *Ex parte Viney in re Vingoe* (1894), 1 Mans. 416; *Carr v. Corfield* (1890), 20 O. R. 218; *Bank of Montreal v. Stair* (1918), 44 O. L. R. 79.

<sup>10</sup> As to the distinction which has been made between "view" and "motive" see *per Vaughan Williams*, in *New Prance & Garrards' Trustee* (1897), 1 Q. B. 607, 617; *In re Fleming Fraser & Co. ex parte*



**Section 31** it is necessary to consider is "the dominant or real motive of the person making the preference"<sup>1</sup>. It is not necessary that the view should have been the debtor's sole view provided it is his substantial effectual or dominant view<sup>2</sup>; but the view must be a view to prefer the creditor to whom the payment was made<sup>3</sup>. The question with what view the transaction was made is one of fact<sup>4</sup>. If the act done can be properly referred to some other view than that of giving the creditor a preference, no policy of law will justify the court in holding that the transaction is fraudulent<sup>5</sup>.

**Pressure.**

It was on this basis that the doctrine of pressure was developed, it being held for example that if the debtor entered into the transaction by reason of fear of criminal or other proceedings, his view was not a view to prefer the creditor, but to protect himself. The doctrine was so far extended that a mere demand by a creditor, without even a threat of legal proceedings, might be sufficient pressure to rebut the presumption of a preference<sup>6</sup>. Pressure has been defined as "pressure, force, demand or request coming from the creditor"<sup>7</sup>. There are even *dicta* to the effect that a man may

*Trustee* (1888), 60 L. T. 154; *Ex parte Suffolk in re Fletcher* (1891), 9 Mor. 8, 12; *Ex parte Deacon in re Ramsay* (1913), 2 K. B. 80; 82 L. J. K. B. 526; 20 Mans. 15; *Ex parte Griffith in re Wilcoxon* (1883), 23 Ch. D. 69, 74-5; 52 L. J. C. H. 717.

<sup>1</sup> S. C., at p. 427. See further as to the point that view means the dominant view, *per* Smith, L.J., in *New, Prance & Garrard v. Hunting* (1897), 2 Q. B. 19, 29; *Ex parte Hill in re Bird* (1883), 23 Ch. D. 695; 52 L. J. Ch. 903; *Ex parte Taylor in re Goldsmid* (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195, *per* Cozens-Hardy, J., in *In re The Stenotyper, Ltd.* (1901), 1 Ch. 250, 255; 70 L. J. Ch. 94; 8 Mans. 203; *per* Phillimore, J., in *re Ramsay ex parte Deacon* (1913), 2 K. B. 80, 85, *supra*; *In re Lake ex parte Dyer* (1901), 1 K. B. 710; 70 L. J. K. B. 390; 8 Mans. 145; *Ex parte Trustee in re Clay* (1896), 3 Mans. 31, 32.

<sup>2</sup> *Ex parte Hill in re Bird, supra*.

<sup>3</sup> *In re Warren ex parte Trustee* (1900), 2 Q. B. 138; *Hope v. Grant* (1890), 20 O. R. 623; *In re Blackpool Motor Car Co., Ltd.* (1901), 1 Ch. 77, 85; 8 Mans. 193; *In re Mills ex parte O. R.* (1888), 5 Mor. 55, creditor now includes surety, s. 31(3).

<sup>4</sup> *Bills v. Smith* (1865), 34 L. J. Q. B. 68; 6 B. & S. 314.

<sup>5</sup> *Ex parte Blackburn in re Cheesebrough* (1871), L. R. 12 Eq. 358; 40 L. J. Bank. 79.

<sup>6</sup> *Stephens v. McArthur* (1891), 19 S. C. R. 446, and cases there cited.

<sup>7</sup> *Per* Harvey, J., in *Ross Bros. v. Pearson* (1905), 1 W. L. R. 338, 575, and see *Campbell v. Barrie* (1871), 31 U. C. R. 279; *In re Hurst* (1876), 6 U. C. P. R. 329.



put pressure on himself<sup>8</sup>, but in considering whether or not such *dicta* are pertinent, it must not be forgotten that section 31 requires a much clearer distinction between motive and "pressure" than has heretofore been necessary; for the admissibility or otherwise of evidence to rebut the presumption of interest will depend on the distinction.

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The point in common between *The Bankruptcy Act* and R. S. O. 1887, c. 124, s. 2, which establishes a difference between *The Bankruptcy Act* and the English Act is that under *The Bankruptcy Act* for a transaction to be a fraudulent preference it must have been made by an insolvent person. Under the English Act no proof need be given that at the time of the transaction the debtor was insolvent. Insolvent is defined in section 2(t)<sup>9</sup>.

Fraudulent preference can only be given by an insolvent.

Section 31(2) purports to do away with the doctrine of pressure<sup>10</sup>, and to shift the onus of proof to those interested in upholding the transaction<sup>1</sup>, once the trustee has shown:—

Effect of sec. 31(2).

(a) That the debtor was insolvent at the time the transaction was entered into;

(b) that it occurred within the three months mentioned in the section;

(c) that the effect was to give a preference<sup>2</sup>.

The presumption which is raised by 31(2) is a rebuttable one<sup>3</sup>, and although evidence of pressure

<sup>8</sup> *Per* Halsbury, L.C., in *Sharp v. Jackson* (1899), A. C. 419, 424, 425; 68 L. J. Q. B. 866; 6 Mans. 264, and *per* Smith, L.J., in *New Prince & Garrard's Trustee* (1897), 2 Q. B. 19, 29, 30; *The Molsons Bank v. Halter* (1890), 18 S. C. R. 88, 95.

<sup>9</sup> The decision of the Privy Council in *National Bank of Australia v. Morris* (1892), A. C. 287, defining what amounts to knowledge of insolvency was on a statute which contained an express proviso that the creditor should not at the time of the payment have known that the debtor was then insolvent.

<sup>10</sup> See *Stevens v. McArthur* (1891), 19 S. C. R. 446; *The Molsons Bank v. Halter* (1890), 18 S. C. R. 88; *Benallack v. Bank of B. N. A.* (1905), 36 S. C. R. 120.

<sup>1</sup> *In re Laurie ex parte Green* (1898), 67 L. J. Q. B. 431; 5 Mans. 48.

<sup>2</sup> As to the phrase "if any such conveyance has the effect of giving a preference," see *The Molsons Bank v. Halter* (1890), 18 S. C. R. 88; *Stephens v. McArthur*, *supra*; *The Bank of Australia v. Harris*, 15 Moo. P. C. 116; *Nunes v. Carter*, L. R. 1 P. C. 342.

<sup>3</sup> *Craig v. McKay* (1906), 12 O. L. R. 121; 8 O. L. R. 651; 4 O. W. R. 274; 6 O. W. R. 160; 25 Occ. N. 10. Section 31(2) appears to have given statutory expression to the law as regards *onus* of proof



**Section 31** is not receivable to support the transaction<sup>4</sup>, the presumption may be rebutted by proof that the dominant motive is not that of preferring the creditor<sup>5</sup>.

Cases where the view is not a view to give a preference (a) a sense of binding obligation.

Thus if a debtor makes a payment or transfers property to a creditor in good faith believing on reasonable grounds that he is under a legal obligation to do so, that is sufficient to negative a fraudulent preference<sup>6</sup>, even though he was not legally bound<sup>7</sup>, but the obligation must appear to the creditor to be legally binding upon him<sup>8</sup>. A sense of moral obligation or honour<sup>9</sup>, or a feeling that to do otherwise would be unjust to the creditor is not sufficient<sup>10</sup>.

(b) Charge given in pursuance of previous agreement.

Where it is shown that a charge given to a creditor was in pursuance of an agreement to give a security, the agreement having been entered into prior to the commencement of the three months period, this will generally avail to rebut the presumption of intent to prefer<sup>4</sup>, and the agreement need not have been one of

as laid down by Vaughan Williams, J., in *In re Lake ex parte Dyer*. "If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that that view was expressed in so many words by the bankrupt; it is a presumption which would arise from the transaction." *In re Lake ex parte Dyer* (1901), 1 Q. B. 710, 717; 70 L. J. K. B. 390; 8 Mans. 145. Where a debtor conveys all his property to a creditor for a past consideration it is presumed that he intended to prefer that creditor: *Payne v. Hendry* (1873), 20 Gr. 144; *Smith v. Cannan* (1853), 2 E. & B. 35; 17 Jur. 911; 22 L. J. Q. B. 290; and see notes to section 3(b). As to the onus of proof under the Act of 1864 see *McWhirter v. Thorne*, 19 U. C. C. P. 302.

<sup>4</sup> *Webster v. Crickmore* (1898), 25 O. A. R. 97; *Edgett v. Steaves* (1906), 2 E. L. R. 131.

<sup>5</sup> *Codville v. Fraser* (1902), 14 M. L. R. 12; *Lawson v. McGeoch* (1893), 20 O. A. R. 464; *Craig v. McKay* (1906), 12 O. L. R. 126; *Webster v. Crickmore* (1898), *supra*; *Empire Sash and Door Co. v. Maranda* (1911), 21 M. L. R. 605; 19 W. L. R. 78.

<sup>6</sup> *Per* Vaughan Williams, J., *In re Fletcher ex parte Suffolk* (1891), 9 Mor. 8; *Bills v. Smith* (1865), 34 L. J. Q. B. 68; 6 B. & S. 314; *Bank of Montreal v. Stair* (1918), 44 O. L. R. 79; *Carr v. Corfield* (1890), 20 O. R. 218.

<sup>7</sup> *In re Vautin ex parte Saffery* (1900), 2 Q. B. 325; 68 L. J. Q. B. 971; 6 Mans. 391.

<sup>8</sup> *Per* Vaughan Williams, J., *In re Fletcher ex parte Suffolk*, *supra*.

<sup>9</sup> *Ex parte Viney in re Vingoe* (1894), 1 Mans. 416.

<sup>10</sup> *In re Blackburn & Co.* (1899), 2 Ch. 725; 68 L. J. Ch. 764.

<sup>1</sup> *Webster v. Crickmore* (1898), 25 O. A. R. 97; *Lawson v. McGeoch* (1893), 20 O. A. R. 464; *Embury v. West* (1888), 15 O. A. R. 357; *Clarkson v. Sterling* (1888), 15 O. A. R. 234; *Smith v. Fair* (1885), 11 O. A. R. 755; *Kerry v. James* (1894), 21 O. A. R. 338; *Stuart v.*



which specific performance would have been decreed<sup>2</sup>. Section 31  
 If the giving of the security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail<sup>3</sup>, nor is a promise to give a security in case insolvency becomes imminent, of any benefit to rebut the presumption of fraudulent preference<sup>4</sup>. But if the debtor becomes bankrupt or makes an assignment before the promise to give security is carried out, the question whether the creditor can succeed in an action for specific performance depends on whether the terms of the promise are sufficiently precise or are too vague and uncertain<sup>5</sup>, and partly on whether or not by reason of any Statute or rule of law the title of the trustee is higher than that of the bankrupt, so destroying the equity of the creditor<sup>6</sup>.

*Thomson* (1893), 23 O. R. 503; *Goulding v. Deeming* (1887), 15 O. R. 201; *McRoberts v. Steinhoff* (1885), 11 O. R. 369; *Brayley v. Ellis* (1882), 1 O. R. 119, affd. 9 O. A. R. 567; *Robins v. Clark* (1880), 45 U. C. Q. B. 362; *Boustead v. Shaw* (1879), 27 Gr. 280; *Northern Commercial Co. v. Powell* (1911), 17 W. L. R. 297; *Tudhope v. Northern Bank* (1909), 10 W. L. R. 122; *Townsend v. Northern Crown Bank* (1912), 26 O. L. R. 291, affd. 27 O. L. R. 479; *Rogers v. Carroll* (1899), 30 O. R. 328; *Ferguson v. Bryans* (1904), 15 M. L. R. 170; *Wade v. Elliott* (1907), 11 O. W. R. 38; *Nelles v. Bank of Montreal* (1882), 7 O. A. R. 743; *Re Hurst* (1876), 6 U. C. P. R. 329. Where there is some technical error in the security so given the creditor's equity under the agreement remains: *Fisher v. Bradshaw* (1902), 4 O. L. R. 162, and see *Wellbanks v. Heney* (1890), 19 O. R. 549; *Kerry v. James* (1894), 21 O. A. R. 338; *In re and ex parte Treedale* (1892), 2 Q. B. 216; 61 L. J. Q. B. 505; 9 Mor. 110; *Bank of Hamilton v. Tambllyn* (1888), 16 O. R. 247.

<sup>2</sup> *Ex parte Wilkinson in re Berry* (1884), 22 Ch. D. 788; 52 L. J. Ch. 657; *Codville v. Fraser* (1902), 14 M. L. R. 12; *Webster v. Crickmore* (1898), 25 O. A. R. 97; *Montgomery v. Corbit* (1896), 24 O. A. R. 311.

<sup>3</sup> *Webster v. Crickmore* (1898), 25 O. A. R. 97; *Armstrong v. Johnston* (1900), 32 O. R. 15; *Breese v. Know* (1897), 24 O. A. R. 203; *Jones v. Kinney* (1884), 11 S. C. R. 708; *In re Jackson & Bassford, Ltd.* (1906), 2 Ch. 467; 75 L. J. Ch. 697; 13 Mans. 306; *Tooke Bros v. Broch* (1907), 3 E. L. R. 270; *Bentley v. Morrison* (1910), 9 E. L. R. 135, 138; and see *Clarkson v. McMaster* (1895), 25 S. C. R. 96; and per Hagarty, C.J.O., in *Clarkson v. Sterling* (1888), 15 O. A. R. 234; and explanation in *Morris v. Morris* (1895), A. C. 625; 64 L. J. P. C. 136; 72 L. T. 879; cf. *Ex parte Fisher*, L. R. 7 Ch. 636; 41 L. J. Bank. 62.

<sup>4</sup> *Armstrong v. Johnston* (1900), 32 O. R. 15.

<sup>5</sup> *Foster v. Russell* (1886), 12 O. R. 136.

<sup>6</sup> Per MacLennan, J., in *Hope v. May* (1896), 24 O. A. R. 16; *Morris v. Morris* (1895), A. C. 625; 64 L. J. P. C. 136; 72 L. T. 879; *McAllister v. Forsyth* (1884), 12 S. C. R. 1.



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(c) Payments in the ordinary course of business.

A man may make payments in the ordinary course of business with the idea of continuing in business rather than with the view of preferring the creditor<sup>7</sup>. Of such payments, payments of trade bills are perhaps the strongest example. If paid when due a presumption is raised that the payment was not with a view to prefer<sup>8</sup>; but no such presumption arises on payment after maturity<sup>9</sup>. The same principle applies to the payment in the usual or customary manner of debts which have become due, and to payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time<sup>10</sup>, and to other transactions made with a view to enable the debtor to continue in business<sup>1</sup>. Thus where a security is given in return for a contemporaneous advance in the belief honestly and reasonably entertained that the advance will enable the debtor to continue his business, there is no fraudulent preference,<sup>2</sup> and the security will be good for all for which it was agreed that it might be held as security<sup>3</sup>.

<sup>7</sup> "Now I think you must say it is not with a view to give an undue preference if a man makes a payment to a creditor in the ordinary course of business. Supposing a bankrupt, although knowing that he is very likely to stop payment next week, struggles on and makes a payment without being particularly asked; supposing he pays his debts and sends his money to meet his bills on those days on which they become due, and does other things so as to keep himself alive, and in good credit for the time; that would not have been undue preference I think because these payments were not made "in favour of" certain creditors as against others, but were made in the hope—a desperate hope, perhaps—that if he were able to keep himself alive something might turn up in his favour." *Per* Blackburn, L.J., in *Tomkins v. Saffery* (1877), 3 A. C. 213, 235; 47 L. J. Bank. 11; see also *Rust v. Cooper* (1777), 2 Cowp. 629; *Vacher v. Cocks* (1830), 1 B. & Ad. 145; *Ex parte Blackburn in re Cheesebrough* (1871), L. R. 12 Eq. 358; 40 L. J. Bank. 79; *Ex parte Kevan in re Crawford* (1878), L. R. 9 Ch. 752, and *Smith v. Hutchinson* (1877), 2 O. A. R. 405.

<sup>8</sup> *In re Clay & Sons ex parte Trustee* (1896), 3 Mans. 31.

<sup>9</sup> *In re Eaton & Co. ex parte Viney* (1897), 2 Q. B. 16.

<sup>10</sup> *Ex parte Kevan in re Crawford* (1874), L. R. 9 Ch. 752; *Ex parte MacKenzie in re Bent* (1873), 42 L. J. Bank. 25; *Ex parte Hodgkin in re Softly* (1875), L. R. 20 Eq. 746; *Ex parte Blackburn in re Cheesebrough* (1871), L. R. 12 Eq. 358.

<sup>1</sup> *Ross v. Dunn* (1889), 16 O. A. R. 552; *Hyman v. Cuthbertson* (1886), 10 O. R. 443; *Codville v. Fraser* (1902), 14 M. L. R. 12.

<sup>2</sup> *Smith v. McLean* (1878), 25 Gr. 567; compare *McCrae v. White* (1883), 9 S. C. R. 22; *In re Hurst* (1876), 6 U. C. P. R. 329; *Kalus v. Hirtger* (1876), 1 O. A. R. 75; *Coates v. Joslin* (1866), 12 Gr. 524; *Boyd v. Glass* (1883), 8 O. A. R. 632.

<sup>3</sup> *Smith v. Harrington* (1881), 29 Gr. 502, 503.



A payment to a secured creditor, *e.g.* a creditor who has a lien on the property of the debtor, is not within the section, at least, it is considered, where the payment does not exceed the value of the security<sup>5</sup>. Section 31  
(d) Payment to a secured creditor.

Where a father makes his son a regular allowance it is a question of fact whether a payment made just before the father becomes bankrupt was given in the ordinary course or for the purpose of securing an advantage to the son over the creditors<sup>6</sup>. If the payment was made with the fraudulent intent of giving the son an advantage over the creditors it cannot on general principles be supported, even though not expressly forbidden by the section<sup>7</sup>. (e) Payment of regular allowance.

A part payment of a debt made with the intention of enabling the creditor to prove in the forthcoming bankruptcy where the debt had been barred by the Statute of Limitations is not it seems a fraudulent preference<sup>8</sup>. (f) Revivor of debt.

The cases just mentioned are cases in which the view was not a view to prefer<sup>9</sup>. There are, however, cases where other circumstances exist which put the transaction outside the class of fraudulent preference. Other circumstances which put the transaction outside fraudulent preference.

Thus if the transaction is with respect to the property of the creditor and not that of the debtor<sup>10</sup>, there is no fraudulent preference, even though the creditor obtains possession of the goods by means of a transaction which *per se* would have amounted to a fraudulent preference<sup>11</sup>. Similarly it is no fraudulent preference (a) Transaction must be with reference to debtor's own property.

<sup>5</sup> *Stevenson v. Wood* (1805), 5 Esp. 200; *High River Meat Market v. Routledge* (1908), 8 W. L. R. 259; and see *In re Carl Hirth* (1899), 1 Q. B. 612; *Gonville's Trustee v. Patent Caramel Co.* (1912), 1 K. B. 599.

<sup>6</sup> *Abell v. Daniell* (1829), M. & M. 370.

<sup>7</sup> S.C.

<sup>8</sup> *In re Lane ex parte Gaze* (1889), 23 Q. B. D. 74; 58 L. J. Q. B. 373; 6 Mor. 143. As to acknowledgment of indebtedness for rent see *Finch v. Gilray* (1889), 16 O. A. R. 484; *Boone v. Martin* (1920), 47 O. L. R. 205.

<sup>9</sup> See as to the circumstance that the transaction was kept secret: *Crosby v. Crouch* (1809), 2 Camp. 166; 16 East. 256.

<sup>10</sup> See as to what was found to be a payment by the debtor even though a third party intervened: *Miller v. Reid* (1879), 4 O. A. R. 479.

<sup>11</sup> *Ex parte Symons in re Jordan* (1880), 14 Ch. D. 693, 697; *In re Landrock ex parte Fabian* (1884), 1 Mor. 62; *Robinson v. Wilson* (1908), 12 O. W. R. 198; *Bank of Hamilton v. Tamblin* (1888), 16 O. R. 247.



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for a debtor to refuse to accept goods consigned to him even when this enables the consignor to exercise his right of *stoppage in transitu*<sup>1</sup>; but if the debtor voluntarily<sup>2</sup> returns goods which he has already accepted and which have become his, there will be a fraudulent preference<sup>3</sup>.

(b) Money clothed with trust.

Where money is advanced for a specific purpose and so clothed with a trust, and the object for which it was advanced fails, there will be no fraudulent preference if the money is returned to the person who advanced it<sup>4</sup>.

It has been held by a majority of the Supreme Court of Canada that a payment by a trustee to his *cestui que trust* to make good a breach of trust is not a fraudulent preference; for it was said the relationship between trustee and *cestui que trust* is not that of debtor and creditor<sup>5</sup>. It would at least seem that where the bankrupt pays the money in order to make good a breach of trust this will negative the presumption that the payment was made with the dominant view of giving a preference<sup>6</sup>. But where trust funds have

<sup>1</sup> *In re Landrock ex parte Fabian* (1884), 1 Mor. 62.

<sup>2</sup> *Ex parte Deacon in re Ramsay* (1913), 2 K. B. 80; 80 L. J. K. B. 526; 20 Mans. 15. This case decided on the English Act must be read subject to the different provisions in *The Bankruptcy Act*.

<sup>3</sup> *Barnes v. Freeland* (1794), 6 T. R. 80; *Dana v. McLean* (1901), 2 O. L. R. 466; *In re Fletcher ex parte Suffolk* (1891), 9 Mor. 8.

<sup>4</sup> *Toovey v. Milne* (1819), 2 B. & Ald. 683; *Edwards v. Glyn* (1859), 28 L. J. Q. B. 350; *Ex parte Kelly, in re Smith-Fleming & Co.*, 11 Ch. D. 306; 48 L. J. Bank. 65; *Ex parte Saffery in re Vautin* (1900), 2 Q. B. 325; 69 L. J. Q. B. 703; 7 Mans. 291; *In re Rogers ex parte Holland & Hannen* (1891), 8 Mor. 243.

<sup>5</sup> *Per Strong, Taschereau and Gwynne in the Molsons Bank v Halter* (1890), 18 S. C. R. 88, following *Ex parte Stubbins in re Wilkinson* (1881), 17 Ch. D. 58; 50 L. J. Ch. 547; *Ex parte Taylor in re Goldsmid* (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; *Ex parte Kelly in re Smith* (1879), 11 Ch. D. 306; 48 L. J. Bank. 65; see also *Halwell v. Township of Wilmot* (1897), 24 O. A. R. 628; *In re Hutchinson ex parte Ball* (1887), 35 W. R. 264; and *Gibbons v. McDonald* (1892), 20 S. C. R. 587; see, however, *per Halsbury, L.C., in Sharp v. Jackson* (1899), A. C. 419, 426; 68 L. J. Q. B. 866; 6 Mans. 264, commented on by Rigby, L.J., *In re Lake ex parte Dyer* (1901), 1 K. B. 710, 715; 70 L. J. K. B. 390; 8 Mans. 145. and *per Buckley, J., In re Blackpool Motor Car Co., Ltd.* (1904), 1 Ch. 77, 85; 70 L. J. Ch. 61; 8 Man. 193.

<sup>6</sup> *Per Vaughan Williams, L.J., In re Lake ex parte Dyer* (1901), 1 K. B. 710, 717; 70 L. J. K. B. 390; 8 Mans. 145; see also *Sharp v. Jackson* (1899), A. C. 419; 68 L. J. Q. B. 866; 6 Mans. 264, where, however, the trustee was said to have put "pressure" on himself.



been paid over to a third party, who is not the trustee and who seeks to restore their equivalent before his bankruptcy, there is a fraudulent preference<sup>7</sup>. Section 31

The Act defines what transactions may be fraudulent preferences. A conveyance or transfer of property<sup>8</sup> or any charge<sup>9</sup> made thereon may be a fraudulent preference<sup>10</sup>. Transactions which may be fraudulent preferences.

Thus an assignment of book-debts may be a fraudulent preference<sup>1</sup>, and an assignment of all the debtor's property for the benefit of certain named creditors only is a fraudulent preference<sup>2</sup>.

The giving of a chattel mortgage to a third party for the benefit of a surety may likewise be a fraudulent preference<sup>3</sup>. When a person to whom a chattel mortgage has been given and book debts assigned allows the debtor to collect the book debts the assignee will not, in default of any special agreement on the point, be allowed to retain the value of what has been collected out of the proceeds of the property covered by the mortgage which has been declared fraudulent<sup>4</sup>.

Under certain provincial Acts, payments of money were not fraudulent preferences. Under *The Bankruptcy Act* payments of money are within the section. (a)  
Payments made. Endorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor<sup>5</sup>.

<sup>7</sup> *Trusts and Guarantee Co. v. Munro* (1900), 19 O. L. R. 480; 14 O. W. R. 699; 1 O. W. N. 52.

<sup>8</sup> *In re Roberts ex parte Daniel* (1888), 5 Mor. 213; *Bank of Montreal v. McTavish* (1867), 13 Gr. 395.

<sup>9</sup> *In re Jackson & Bassford, Ltd.* (1906), 2 Ch. 467; 75 L. J. Ch. 697; 13 Mans. 306.

<sup>10</sup> Property is defined in section 2(*dd*). The property must not be the property of the creditor: see *supra*, p. 351.

<sup>1</sup> *Labatt v. Bixel* (1881), 28 Gr. 593; *Griffiths v. Perry* (1881), 6 O. A. R. 672; but see *McGregor v. Hume* (1869), 28 U. C. Q. B. 380.

<sup>2</sup> See *passim* *Thorne v. Torrance* (1867), 16 U. C. C. P. 445; *affd.* 18 U. C. C. P. 29.

<sup>3</sup> *Stecher Lithographic Co. v. Ontario Seed Co* (1912), 46 S. C. R. 541, and see section 31(3). The substance of such transactions is to be looked at: *Powell v. Calder* (1885), 8 O. R. 505; and see *In re Blackpool Motor Car Co.* (1901), 1 Ch. 77; 70 L. J. Ch. 61; 8 Mans. 193.

<sup>4</sup> *Stecher Lithographic Co. v. Ontario Seed Co.*, *supra*.

<sup>5</sup> *Davidson v. Fraser* (1896), 23 O. A. R. 439, *affd.* *Fraser v. Davidson* (1897), 28 S. C. R. 272; as to "payment" under Provincial Acts



## Section 31

(b)  
Judicial  
proceedings  
taken or  
suffered.

Judicial proceedings taken or suffered are within the section. Thus where a debtor permits judgment to go by default this may be a fraudulent preference<sup>6</sup>. A collusive confession of judgment is within the section<sup>7</sup>. In England under a Statute which made the suffering of an execution an act of bankruptcy it has been held that where a trader commits such an act of bankruptcy by procuring his goods to be taken in execution with intent to defeat or delay creditors, the execution though levied *bona fide* by the execution creditor, was a fraudulent preference<sup>8</sup>. It has been held in an old case that if after the assignment of a bankrupt's estate a creditor who knows of the assignment attaches the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use<sup>9</sup>.

What is not  
a fraudulent  
preference  
may be a  
fraudulent  
transfer or  
a common  
law fraud, or  
fall within  
13 Eliz. c. 5.

A transaction which is not a fraudulent preference of the creditors of a partnership, because it prefers only the separate creditors of the partners, is a fraudulent transfer of property and an act of bankruptcy<sup>10</sup>. A case which does not fall within the definition of a fraudulent preference may also be a common law fraud<sup>1</sup>, or fall within 13 Eliz. c. 5. But a wife entitled to dower in the lands of her husband may without infringing 13 Eliz. c. 5, require security from him on his property as a condition to the bar of her dower. The security so given will be a valid security as against

see *per Osler, J.*, in *Campbell v. Roche* (1891), 18 O. A. R. 646, 656; *Robinson v. McGilivray* (1906), 12 O. L. R. 91; (1906), 13 O. L. R. 232; (1907), 39 S. C. R. 281; *Gordon MacKay v. Union Bank of Canada* (1899), 26 O. A. R. 155.

<sup>6</sup> *Ex parte Lancaster in re Marsden* (1883), 25 Ch. D. 311; 53 L. J. Ch. 1123.

<sup>7</sup> *Edison Electric v. Westminster Tramway Co.* (1897), A. C. 193; 66 L. J. P. C. 36; 4 Mans. 244.

<sup>8</sup> *Hall v. Wallace*, 7 M. & W. 353; and see *In re Jones* (1868), 4 U. C. P. R. 317.

<sup>9</sup> *Hunter v. Potts* (1791), 4 T. R. 182; *affd. sub nom. Phillips v. Hunter* (1795), 2 H. Bl. 402; but see *Roe v. Smith* (1868), 15 Gr. 344; which, however, was decided under a statute which did not contain such an extensive definition of "property" as that in the present Act. See section 2 (*dd*).

<sup>10</sup> Section 3 (*b*); *Ex parte Snowball in re Douglas* (1872), L. R. 7 Ch. 534; 41 L. J. Bank. 49; *Ex parte McLean*, 24 L. T. 144, and see *Calvin v. Tranchemontagne* (1870), 14 L. C. J. 210.

<sup>1</sup> *In re Badham* (1893), 10 Mor. 252, 257.



creditors provided the consideration obtained by the wife is fair and reasonable, and the transaction is otherwise *bona fide*<sup>2</sup>. Where the goods covered by the chattel mortgage to the wife are seized and sold by execution creditors the court may order the proceeds of the goods to remain in court to abide further order so that the wife may have the same security as she had by the mortgage<sup>3</sup>. Section 32

Evidence of other acts of preference in favour of other creditors committed by the debtor shortly before or shortly after the transaction may be given to show his intent<sup>4</sup>. Evidence of other acts.

The word "creditor" in the section means any person who at the date when the impeached transaction was entered into was entitled, if bankruptcy supervened, to prove in the bankruptcy and share in the distribution of the bankrupt's estate, and so includes a surety<sup>5</sup>. Meaning of "creditor."

32 (1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy or of an authorized assignment on an execution, attachment or other process against property, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy or an authorized assignment,—

(a) any payment by the bankrupt or assignor to any of his creditors;

(b) any payment or delivery to the bankrupt or assignor;

<sup>2</sup> *Beavis v. McQuire* (1882), 7 O. A. R. 704; *Forrest v. Laycock* (1871), 18 Gr. 611; *Black v. Fountain* (1876), 23 Gr. 174; *Fleury v. Pringle* (1878), 26 Gr. 67; *McDonald v. Curran* (1909), 1 O. W. N. 121.

<sup>3</sup> *Morris v. Martin* (1890), 19 O. R. 564.

<sup>4</sup> *In re Ramsay ex parte Deacon* (1913), 2 K. B. 80; 82 L. J. K. B. 526; 20 Mans. 15.

<sup>5</sup> *Ex parte Read in re Paine* (1897), 1 Q. B. 122; 66 L. J. Q. B. 71; 3 Mans. 309; *In re Blackpool Motor Car Co.* (1901), 1 Ch. 77; 70 L. J. Ch. 61; 8 Man. 193; and see *Ex parte Kelly in re Smith Fleming & Co.* (1879), 11 Ch. D. 306; 48 L. J. Bank. 65; *Ex parte Taylor in re Goldsmid* (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; *Sharpe v. Jackson* (1899), A. C. 419.



Section 32

(c) any conveyance or transfer by the bankrupt or assignor for adequate valuable consideration;

(d) any contract, dealing, or transaction by or with the bankrupt or assignor for adequate valuable consideration;

provided that both the following conditions are complied with, namely:—

(i) that the payment, delivery, conveyance, assignment, transfer, contract, dealing, or transaction, as the case may be, is in good faith and takes place before the date of the receiving order or authorized assignment; and,

(ii) that the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction was made, executed or entered into, has not at the time of the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt or assignor.

“Adequate valuable consideration” defined.

(2) The expression “adequate valuable consideration” in paragraph (c) of this section means a consideration of fair and reasonable money value with relation to that of the property conveyed, assigned or transferred, and in paragraph (d) hereof means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

**Cross References Act:** Effect of R. O. and A. A. on executions, etc., 11(1) *cf.* 11(10); avoidance of settlements, 29; avoidance of preferences, 31; available act of bankruptcy defined, 2(h).

**Analogous Legislation:** English Acts, 1914. s. 45 and *cf.* 46; 1883, s. 49; 1869, ss. 94, 95(1).



## ANALYSIS OF NOTES.

## Section 32

Object of the section.

Cases where the protection of the section is unnecessary.

Section may protect fraudulent conveyances.

Circumstances under which the section affords protection.

Cases where no protection.

Notice.

Available Act of Bankruptcy.

*Bona fides.*

Transaction must be completed before the date of receiving order.

Adequate valuable consideration.

Any payment by the bankrupt to any of his creditors.

Any payment or delivery to the bankrupt or assignor.

Any contract, dealing or transaction.

The words "before that time" which followed the words "committed by the bankrupt" in the last line of section 32(1)(d) (ii), were deleted by section 26 of *The Bankruptcy Act Amendment Act, 1921*.

The object of the section is to obviate the hardship incident to the relation back of the title of the trustee<sup>7</sup> and to protect *bona fide* dealings with the bankrupt which have been completed before notice of an act of bankruptcy\*. This section differs from its English counterpart in requiring "adequate valuable consideration", not merely "valuable consideration". The word "bankruptcy" as used in this section probably means the condition of a debtor against whom a receiving order and adjudication have been made<sup>9</sup>. The effect of the making of a receiving order and of an authorized assignment on executions, attachments and other process against property is given in section 11(1). It should be noted that section 32 is not expressly made subject to section 30.

There are cases in which the protection afforded by this section either does not apply or is not required; such as transactions which occur prior to the date to

<sup>7</sup> Sections 4(10), 25. It seems to have been overlooked that there is no "relation back" in the case of an authorized assignment.

\* *In re O'Shea's Settlement* (1895), 1 Ch. 325, 330; 2 Mans. 4. "The intention of this section is to place a creditor who gets back his goods before notice of an act of bankruptcy in the same position as a creditor who gets them back before commission of an act of bankruptcy": *Graham v. Furber* (1853), 14 C. B. 134, 156; *In re Seaman ex parte Furness Finance Co.* (1896), 1 Q. B. 412, 415; 65 L. J. Q. B. 348; 3 Man. 19.

<sup>9</sup> See notes to sections 4(10), 6(3).



**Section 32** which the title of the trustee relates back<sup>10</sup>. There may even be transactions occurring within the period covered by the relation back of the title of the trustee for which the protection afforded by this section need not be invoked. Such a case occurs when the trustee has no higher or better title than the bankrupt. Thus where a sale of goods has been induced by the fraud of the purchaser the vendor on discovering the fraud is entitled within a reasonable time, although he has notice of an available act of bankruptcy, to disaffirm the sale and retake possession of the goods<sup>1</sup>, and to set off the damages caused by the fraud of the bankrupt against the amount paid on account of the purchase price<sup>2</sup>.

On the other hand the court is not bound to give the benefit of section 32 to all cases which fall outside sections 29 and 31. If any such transaction is contrary to the policy of the bankruptcy laws, the protection of section 32 may not be extended to it<sup>3</sup>. While section 32 protects a *bona fide* transferee from the debtor, it does not protect a *bona fide* transferee from a transferee of the debtor,<sup>4</sup> nor does it in England protect any conveyance or payment made in pursuance of a contract which is protected by the section<sup>5</sup>.

<sup>10</sup> See *Young v. Hope* (1848), 2 Ex. 104, 108; *per* Campbell, L.J., in *Brewin v. Short* (1855), 5 E. & B. 227; 24 L. J. Q. B. 297, 300. The doctrine of relation back is discussed in *Ponsford Baker & Co. v. Union of Smith's Bank, Ltd.* (1906), 2 Ch. 444, 451; 75 L. J. Ch. 724; 13 Mans. 321, and in the cases mentioned in the notes to section 6(3).

<sup>1</sup> *In re Eastgate ex parte Ward* (1905), 1 K. B. 465; 74 L. J. K. B. 324; 12 Mans. 11.

<sup>2</sup> *Tilley v. Bowman, Ltd.* (1910), 1 K. B. 745; 79 L. J. K. B. 547; 17 Mans. 97. That is under the English practice with respect to set-off. See notes to section 28(1).

<sup>3</sup> *In re Badham ex parte Palmer* (1893), 10 Mor. 252; *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19; *Ex parte Barter in re Walker* (1884), 26 Ch. D. 510; 53 L. J. Ch. 802; *Ex parte MacKay in re Jeavons* (1873), L. R. 8 Ch. 643; 42 L. J. Bank. 68, and compare *Ex parte Waller in re Dunkley* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 12 Mans. 384. In certain provinces there is no common law of bankruptcy. See Chapters II., III., IV.

<sup>4</sup> *In re Gunsbourg* (No. 3) (1920), 2 K. B. 426; 89 L. J. K. B. 425; (1920), B. & C. R. 50.

<sup>5</sup> But protection may be given on grounds of equity even to secondary alienees to the extent at least of the consideration given, *per* Wright J., in *In re Slobodinsky ex parte Moore* (1903), 2 K. B. 531-2; 72 L. J. K. B. 883; 10 Mans. 341; and the cases there referred to, and *per*



Thus where a contract is made for the sale of property, time being of the essence of the contract, the purchaser being unaware of any available act of bankruptcy, and before the date for completion the purchaser becomes aware of an available act of bankruptcy, he is entitled in England to refuse to complete, and to recover back the deposit paid because the vendor is not in a position to give either a good conveyance or a valid receipt for the purchase money<sup>6</sup>. Where no injustice will be done the defendant by not applying the terms of the section as in the case of a transaction which is on the border line of a settlement under section 29, it may be that section 32 will not be applied by the court<sup>7</sup>.

Although the section does not apply to protect transactions impeached as fraudulent preferences or settlements it may apply to protect transactions impeached as fraudulent conveyances<sup>8</sup>, provided the transaction is not entered into for the very purpose of doing that which in law constitutes an act of bankruptcy<sup>9</sup>; and provided there is good faith<sup>10</sup>, even though the impeached transaction is an act of bankruptcy<sup>1</sup>.

The section affords protection to transactions where,

Kennedy, L.J., in *Ex parte Green in re Hart* (1912), 3 K. B. 6, 18; 81 L. J. K. B. 1213; 19 Mans. 334.

<sup>6</sup> *Powell v. Marshall Parkes & Co.* (1899), 1 Q. B. 710; 68 L. J. Q. B. 477; 6 Mans. 157, and see *Western v. Harris* (1889). L. J. N. C. 113, cf. *Ex parte Holthausen in re Scheibler*, L. R. 9 Ch. 722; 44 L. J. Bank. 26. Under *The Bankruptcy Act* the relation back of the title of the trustee is not so extensive as under the English Act. See notes to section 4(10).

<sup>7</sup> *Sturmeys's Trustee in re Sturmeys* (1913), 107 L. T. 718.

<sup>8</sup> *Sturmeys's Trustee in re Sturmeys*, *supra*.

<sup>9</sup> *In re Sharp ex parte Gundry* (1900), 83 L. T. 416.

<sup>10</sup> *In re Jukes ex parte O. R.* (1902), 2 K. B. 58; 71 L. J. K. B. 710; 9 Mans. 249, and see *Munro v Standard Bank of Canada* (1913), 30 O. L. R. 12; 16 D. L. R. 293. There is not good faith where a creditor takes a transfer of substantially the whole of the property of the debtor in payment of a past debt knowing that there are other creditors: *In re Jukes ex parte O. R.* (1902), *supra*; but see *In re Dunkley ex parte Waller* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 12 Mans. 384.

<sup>1</sup> *Shears v. Goddard* (1896), 1 Q. B. 406; 65 L. J. Q. B. 344; 3 Mans. 24. See formerly *Smith v. Cannan* (1853), 2 E. & B. 35; 22 L. J. Q. B. 290.

Section 32

Section may  
protect  
fraudulent  
conveyances.



## Section 32

Circumstances under which the section affords protection.

- (1) the person dealing with the bankrupt—
  - (a) has no notice of an available act of bankruptcy<sup>2</sup>, and
  - (b) has acted in good faith; where
- (2) the transaction is completed before the date of the receiving order or authorized assignment<sup>3</sup>; and
- (3) adequate valuable consideration has passed<sup>4</sup>.

Where any one of these requirements is missing the transaction is not protected against the title of the trustee, who alone has authority to deal with the property of the debtor and to give receipts for payments<sup>5</sup>. Thus when the creditor knows of an available act of bankruptcy committed by his debtor, the creditor cannot be compelled to receive payment of his debt<sup>6</sup>. Further, the debtor of an insolvent person, who in England pays over to an assignee for the general benefit of creditors the debt owing to the bankrupt, having notice of the act of bankruptcy constituted by the assignment, may be required to pay over again to the trustee in bankruptcy, for in England there are no authorized assignment provisions, and such an assignee may be a trustee *de son tort*<sup>7</sup>. Similarly after notice of an act of bankruptcy a banker paying the drafts or cheques of the debtor does so at his peril subject to the possible relation back of the title of the trustee<sup>8</sup>.

<sup>2</sup> "Available act of bankruptcy" is defined in section 2(h). Cf. section 4(3) (b).

<sup>3</sup> From which time on there is no doctrine of relation back.

<sup>4</sup> This is only required in two of the four cases set out in the section.

<sup>5</sup> See notes to section 6(3).

<sup>6</sup> And the court, if it has a discretion in the matter, should not under such circumstances order proceedings on a judgment to be stayed on payment of the amount due on the judgment: *Brook v. Emerson* (1906), 95 L. T. 821, and see *In re Gentry* (1910). 1 K. B. 825; 79 L. J. K. B. 585; 17 Mans. 104; and cases collected under section 6(3).

<sup>7</sup> *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344.

<sup>8</sup> *Vernon v. Hankey* (1787), 2 T. R. 113; *McCarthy v. Capital & Counties Bank* (1911), 2 K. B. 1088; 81 L. J. K. B. 14; 18 Mans. 343; *Ponsford Baker & Co. v. Union of London & Smith's Bank* (1906), 2 Ch. 444; 75 L. J. Ch. 724; 13 Mans. 321. *The Bankruptcy Act* being modelled on the English Act of 1883 does not contain the equivalent of section 46 of the English Act of 1914, which is designed to prevent the inconvenience which arises from the rule of law in these cases, and from *Davis v. Petrie* (1906), 2 K. B. 786; 75 L. J. K. B. 992; 13 Mans. 344. Section 46 of the English Act of 1914 reads:—"46. A payment of money



On the other hand the section does not protect every innocent creditor who has no notice of an act of bankruptcy. Thus where a trader fraudulently transfers his business to a company and then induces a mortgagee of the business to release his mortgage in return for debentures of the company, and the transfer to the company is set aside on the ground that the company had notice of an available act of bankruptcy, or was privy to the fraud, the mortgagee is not entitled to be put back into his original position. His remedy is to prove against the debtor's estate for damages for fraud<sup>9</sup>. But where in a similar case the innocent party contracts with the debtor before the transfer to the company, the transaction would appear to be within the protection of section 32 and the creditor entitled to prove against the debtor's business for the amount by which the company falls short by reason of not having the debtor's business<sup>10</sup>.

Notice, it has been said, means knowledge or willfully abstaining from acquiring such knowledge<sup>1</sup>. A creditor has notice of an act of bankruptcy when he has received formal notice, even if he has not read the notice<sup>2</sup>, or when he has received notice of facts which were sufficient to have informed him that an act of bankruptcy had been committed if he had drawn the natural inference from the facts<sup>3</sup>. Thus notice of the filing of a petition is notice of an act of bankruptcy<sup>4</sup>, to

or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him, shall, notwithstanding anything in this Act, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bona fide*.<sup>5</sup>

<sup>9</sup> *In re Goldburg ex parte Silverstone* (1912), 1 K. B. 384; 81 L. J. K. B. 382; 19 Mans. 44.

<sup>10</sup> *In re Slobodinsky ex parte Moore* (1903), 2 K. B. 517; 72 L. J. K. B. 883; 10 Mans. 341; and see *Ex parte Green in re Hart* (1912), 3 K. B. 6, 18; 81 L. J. K. B. 1213; 19 Mans. 334.

<sup>1</sup> *Per Coltman and Maule, JJ.*, in *Bird v. Bass* (1843), 6 M. & G. 143, 147.

<sup>2</sup> *Ex parte Snowball in re Douglas* (1872), L. R. 7 Ch. 534; 41 L. J. Bank. 49.

<sup>3</sup> *Ex parte Snowball in re Douglas*, *supra*; *National Bank of Australia v. Morris* (1892), A. C. 287, 290; *Smith v. Osborn* (1858), 1 F. & F. 267; *Lackington v. Elliott* (1844), 13 L. J. C. P. 153; 7 M. & G. 538; *In re Sedgwick ex parte Hobbs* (1892), 9 Mor. 217.

<sup>4</sup> *Lucas v. Dicker* (1880), 6 Q. B. D. 84; 50 L. J. C. P. 190; *In re Sedgwick ex parte Hobbs*, 9 Mor. 217.

Section 32  
Cases where  
no protec-  
tion.

Notice



**Section 32** the extent at least of putting the onus on the person claiming the protection of the section<sup>5</sup>; but *semble*, notice that a bankruptcy petition has been dismissed is not constructive notice that an act of bankruptcy has been committed by the debtor<sup>6</sup>, and notice of an intention to commit an act of bankruptcy is not notice of an available act of bankruptcy<sup>7</sup>, for, it seems, there cannot be notice of an act of bankruptcy before it takes place<sup>8</sup>. A notice stating circumstances which may or may not amount to an act of bankruptcy is insufficient<sup>9</sup>. Any communication which ought to induce the creditor to believe the notification to be true, such as formal notice from the solicitors of the petitioning creditor, will be sufficient<sup>10</sup>. A general statement without particularizing the act of bankruptcy may be sufficient<sup>1</sup>. If an attempt is made to describe the act of bankruptcy and the facts given do not constitute an act of bankruptcy there is no notice<sup>2</sup>. A creditor is deemed to have notice of proceedings under his own execution, and when an act of bankruptcy occurs in consequence thereof he cannot receive moneys to which the title of the trustee relates back<sup>3</sup>. In certain cases notice to a person other than the creditor is notice to the creditor<sup>4</sup>.

<sup>5</sup> *In re Gershon & Levy ex parte Coote and Richards* (1915), 2 K. B. 527; 84 L. J. K. B. 1668; 1 H. B. R. 146.

<sup>6</sup> *In re O'Shea's Settlement* (1895), 1 Ch. 325; 64 L. J. Ch. 263; 2 Mans. 4.

<sup>7</sup> *Ex parte Arnold in re Wright* (1876), 3 Ch. D. 70; *In re Waugh ex parte Dickin* (1876), 4 Ch. D. 524; 46 L. J. Bank. 26; *Ex parte Halifax* (1842), 2 M. D. & D. 544; *In re Morgan ex parte Turner* (1895), 2 Mans. 508; *Ex parte Glynn in re Ridge* (1840), 6 Jur. 839; 1 M. D. & D. 25.

<sup>8</sup> *In re Boocock* (1916), 1 K. B. 816.

<sup>9</sup> *Evans v Hallam* (1871), L. R. 6 Q. B. 713; 40 L. J. Q. B. 229; *Lucas v Dicker* (1880), 6 Q. B. D. 84; 50 L. J. C. P. 190; 43 L. T. 429; 29 W. R. 115; *In re Boocock* (1916), 1 K. B. 816.

<sup>10</sup> *Hope v. Meek* (1855), 10 Ex. 829; 25 L. J. Ex. 11; as to notice by post see *Bird v. Bass* (1843), 6 M. & G. 143; *Smith v Osborn* (1858), 1 F. & F. 267.

<sup>1</sup> *Turner v. Hardcastle* (1863), 11 C. B. N. S. 683; 31 L. J. C. P. 193; *Udal v. Walton* (1845), 14 M. & W. 254.

<sup>2</sup> *Conway v. Nall* (1845), 1 C. B. 643, 649.

<sup>3</sup> *Ex parte Dawes in re Husband* (1875), L. R. 19 Eq. 438; 44 L. J. Bank. 62.

<sup>4</sup> *Edwards v. Cooper* (1847), 11 Q. B. 33; *Pike v. Stevens* (1848), 12 Q. B. 465; 17 L. J. Q. B. 282; *Pennell v. Stephens* (1849), 7 C. B. 987; 18 L. J. C. P. 291; *Brewin v. Briscoe* (1859), 28 L. J. Q. B. 329;



The words "notice of an available act of bankruptcy" mean notice of an act of bankruptcy which would have been available for the making of the adjudication which is actually made, *i.e.* an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication is founded<sup>5</sup>.

Section 32

Available  
act of bank-  
ruptcy.

A transaction which is contrary to the policy of the bankruptcy law<sup>6</sup>, even though it does not fall within any prohibitory section, cannot be said to be *bona fide*, and will not be protected<sup>7</sup>. Payments made, not in the ordinary course of business<sup>8</sup>, but made and accepted for the very purpose of doing that which in law constitutes an act of bankruptcy, which payments would have been known both to the payer and to the recipient to constitute an act of bankruptcy had they adverted to the legal effect of the facts known to them, will not be protected as made in good faith<sup>9</sup>. Where a creditor takes a transfer of substantially the whole of the property of his debtor in payment of a past debt, with notice that there are other creditors, he cannot be said to be acting in good faith<sup>10</sup>.

*Bona fides*

*Ex parte Schulte in re Matanle* (1874), L. R. 9 Ch. 409; *In re Ashton ex parte McGowan* (1891), 8 Mor. 72; *Brittain v Brown*, 24 L. T. N. S. 504, 506; *Ex parte McGowan in re Ashton*, 8 Mor. 72; 39 W. R. 320.

<sup>5</sup> *Ex parte Gilbey in re Bedell* (1878), 8 Ch. D. 248; 47 L. J. Bank. 49; *Ex parte Quilter in re Barnes* (1882), 30 W. R. 739; *per* Cotton, L.J., in *Hood v. Newby* (1882), 21 Ch. D. 605, at 611; 52 L. J. Ch. 204, differing from James, L.J., in *Ex parte Crosbie in re Bedell* (1877), 7 Ch. D. 123, 125; 47 L. J. Bank. 19; see as to what is an available act of bankruptcy, sections 2(h), 4(3)(b), 8(2).

<sup>6</sup> Or of the general law: *Ward v. Fry*, 50 W. R. 72; 85 L. T. 394.

<sup>7</sup> *Ex parte Palmer in re Badham* (1893), 69 L. T. 356; 10 Mor. 252; compare *Ex parte Waller in re Dunkley & Son* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 12 Mans. 384; and see Chapter VI.

<sup>8</sup> As to what is in the ordinary course of business see *Greenburg v. Lenz* (1905), 2 W. L. R. 64.

<sup>9</sup> *In re Sharp*, 83 L. T. 416 *et seq.*

<sup>10</sup> *In re Jukes ex parte Official Receiver* (1902), 2 K. B. 58; 71 L. J. K. B. 710; 9 Mans. 249, and see under the Statute of Elizabeth *Cameron v Cusack* (1890), 17 O. A. R. 493, 495; *McDonald v. Horan* (1908), 12 O. W. R. 1151. The expression *bona fide* under the various provincial assignments Acts has not necessarily the same signification as under *The Bankruptcy Act*. In many cases under provincial Acts the test of *bona fides* is whether the creditor had knowledge of the "insolvency" of the debtor: *Stecher Lithographic Co. v. Ontario Seed Co.* (1912), 46 S. C. R. 545, 551; *Campbell v. Roache*, (1891), 18 O. A. R. 646; in others ignorance of the intent of the grantor to defraud his creditors: *McDonald v. Horan* (1908), 12 O. W. R. 1151; *Stecher*



## Section 32

But for a creditor to purchase at a fair value all the stock in trade of the debtor, setting off against the purchase price the amount owing to him, is not to act *mala fide*<sup>1</sup>. Notice of anything wrong or of anything that really puts a person dealing with the bankrupt upon inquiry as to the fraud which the debtor was committing is sufficient to negative "good faith"<sup>2</sup>. Where there is good faith on the part of the grantee, but not on the part of the grantor<sup>3</sup>, and there will be no hardship on the grantee in setting aside the transaction, this may it seems be done<sup>4</sup>.

Transaction must be completed before date of receiving order

The transaction must "take place", that is be completed before the date of the receiving order or authorized assignment<sup>5</sup>. The receiving order being a judicial proceeding, takes effect from the beginning of the day<sup>6</sup> on which it was made<sup>7</sup>. The payment "takes place" and is complete when a cheque, bill of exchange or order is given in payment, and this, even though the cheque is post dated, or the bill of exchange not yet due. Knowledge subsequently acquired of an adjudication will not affect the transaction<sup>8</sup>. The section does not protect payments made after the date of the receiving order; so that a purchaser who pays the balance of

*Lithographic Co. v. Ontario Seed Co.*, *supra*; and see *Burns & Lewis v. Wilson* (1897), 28 S. C. R. 207; *Gibbons v. Wilson* (1890), 17 O. A. R. 1; *Hall v. Kissock* (1853), 11 U. C. Q. B. 9; *Know v. Traver* (1877), 24 Gr. 477.

<sup>1</sup> *Lewis v. Brown* (1884), 10 O. A. R. 639. See, however, as to compliance with *The Bulk Sales Acts*, section 3(h).

<sup>2</sup> *Per Wright, J.*, in *re Slobodinsky ex parte Moore* (1903), 2 K. B. 517, at 525; 72 L. J. K. B. 883; 10 Mans. 341; and see *per Cairns, L.C.*, in *Butcher v. Stead* (1875), L. R. 7 H. L. 839, 847; 44 L. J. Bank. 126, a case on the section of the Act of 1869, which corresponds to section 31.

<sup>3</sup> See *Mackintosh v. Pogose* (1895), 1 Ch. 505; 64 L. J. Ch. 274; 2 Mans. 27.

<sup>4</sup> *Sturmey's Trustee in re Sturmey* (1913), 107 L. T. 718.

<sup>5</sup> *Bowman v. Malcolm* (1843), 12 L. J. Ex. 397; 11 M. & W. 833, 844; *Brewin v. Short* (1855), 24 L. J. Q. B. 297, 300.

<sup>6</sup> *Per Wright J.*, in *Ex parte and in re Pollard* (1903), 2 K. B. 41, 45; 72 L. J. K. B. 509; 88 L. T. 476; 10 Mans. 152, citing *In re Hastings ex parte Brown* (1892), 61 L. J. Q. B. 654; 9 Mor. 234; and see *The Thames* (1890), 63 L. T. 353, 356.

<sup>7</sup> Not from the beginning of the day on which the order is dated, where the order has been incorrectly dated: *In re Teale ex parte Blackburn* (1912), 2 K. B. 367; 81 L. J. K. B. 1243; 19 Mans. 327, and see notes to section 4.

<sup>8</sup> *Ex parte Richdale in re Palmer* (1881), 19 Ch. D. 409; 51 L. J. Ch. 116; *Green v. Bradfield* (1844), 1 C. & K. 449.



his purchase money to the bankrupt may be required Section 32  
to pay over again to the trustee<sup>9</sup>.

The English Act requires only "valuable consideration" not "adequate valuable consideration"<sup>10</sup>. Provided there is some agreement between the parties to make it so<sup>1</sup>, a past debt may be "valuable consideration"<sup>2</sup>. It has yet to be decided whether a different rule prevails in Canada<sup>3</sup>. As the section is expressly made subject to the provisions of the Act with respect to the avoidance of preferences, no question of preference is involved in any transaction covered by this section. The numerous cases on provincial Acts requiring a "present actual *bona fide* advance of money" in order to support certain assignments are of little assistance on this question<sup>4</sup>. When bankers of a debtor place to his credit the proceeds of a cheque which he has deposited they become holders of the cheque for value<sup>5</sup>. It would seem that where one of the covenants or one portion of the transaction can be related to the consideration which passed, the

Adequate  
valuable  
considera-  
tion.

<sup>9</sup> *Ex parte Rabbidge in re Pooley*, 8 Ch. D. 367; 48 L. J. Bank. 15.

<sup>10</sup> In *Sturmey's Trustee in re Sturmey* (1913), 107 L. T. 718, Phillimore, J., inquired whether the consideration for the transaction was sufficient.

<sup>1</sup> The mere existence of past debt is no "valuable consideration" for the giving of a security when the creditor is unaware of the execution of the security: *Wigan v. English and Scottish Law Life Assurance Association* (1909), 1 Ch. 291; *In re Barker's Estate* (1875), 44 L. J. Ch. 487, 490; and *per* Vaughan Williams in *Glegg v. Bromley* (1912), 3 K. B. 474, 479; 81 L. J. K. B. 1081.

<sup>2</sup> *Ex parte Waller in re Dunkley & Son* (1905), 2 K. B. 683; 74 L. J. K. B. 963; 12 Mans. 384; *Ex parte O. R. in re Jukes* (1902), 2 K. B. 58; 71 L. J. K. B. 710; 9 Mans. 249. As to what is not valuable consideration see *Sturmey's Trustee in re Sturmey* (1913), 107 L. T. 718.

<sup>3</sup> What is a fair and reasonable value is a question of fact: *Cameron v. Perrin* (1887), 14 O. A. R. 565, 572.

<sup>4</sup> See *Campbell v. Patterson*, *Meador v. McKinnon* (1892), 21 S. C. R. 645; *Empire Sash and Door Co. v. Maranda* (1911), 21 M. L. R. 605; 19 W. L. R. 78; *Goulding v. Deeming* (1888), 15 O. R. 201.

<sup>5</sup> *Ex parte Richdale in re Palmer* (1881), 19 Ch. D. 409; 51 L. J. Ch. 116; a cheque is a bill of exchange payable at a banker's and not an assignment of money; *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74; *Schroeder v. Central Bank of London* (1876), 34 L. T. 735. As to the effect of an assignment of a *chose in action* see *Ex parte Arnold in re Wright* (1876), 3 Ch. D. 70; 45 L. J. Bank. 30.



**Section 32** assignment may be sustained as to part and set aside as to the other part<sup>6</sup>.

Any payment by the bankrupt to any of his creditors.

We turn now to the first of the four transactions mentioned in the section, "any payment by the bankrupt or assignor to any of his creditors". Under provincial Acts a distinction was made between a payment of money and a realization of a security. Certain of the cases on this distinction may be useful under *The Bankruptcy Act*<sup>7</sup>. Payment by a third person, who is in effect the agent of the bankrupt, may be payment by the bankrupt within the meaning of section 31<sup>8</sup>.

Any payment or delivery to the bankrupt or assignor.

Payment to the bankrupt under 32(b) must be distinguished from loan<sup>9</sup>. Delivery contemplates delivery of goods<sup>10</sup>. Where a cheque is delivered by the drawer to the payee in good faith and without notice of an act of bankruptcy previously committed by the payee, on which an adjudication is subsequently made, the transaction is protected and the trustee cannot recover the amount of the cheque from the drawer<sup>1</sup>; and where before the date of payment the drawer receives notice of an adjudication of bankruptcy made against the payee since the delivery of the cheque to him upon an act of bankruptcy committed by him before the delivery, he is not bound, for the benefit of the bank-

<sup>6</sup> *Sturmeys Trustee in re Sturmeys* (1913), 107 L. T. 718. See under provincial statutes as to separability, *Hunt v. Long* (1916), 35 O. L. R. 502; *Kitching v. Hicks* (1884), 6 O. R. 739; *Honsinger v. Kuntz* (1909), 14 O. W. R. 233; *Cameron v. Perrin* (1888), 14 O. A. R. 565; *Douglas v. Hourie* (1909), 10 W. L. R. 67; *Falls v. Gibb, Falls v. Young* (1906), 8 O. W. R. 397; *Langley v. Beardsley* (1909), 18 O. L. R. 67; *Campbell v. Patterson, Mader v. McKinnon* (1892), 21 S. C. R. 645; *Goulding v. Deeming* (1888), 15 O. R. 20; *Kitching v. Hicks* (1884), 6 O. R. 739; *Empire Sash and Door Co. v. Maranda* (1911), 21 M. L. R. 605; 19 W. L. R. 78; *Bartels, Shewan & Co., Ltd. v. Winnipeg Cigar Co.* (1909), 10 W. L. R. 263; *Robinson v. Maple Leaf* (1917), 26 M. L. R. 238; *Campbell v. McKinnon* (1892), 21 S. C. R. 645.

<sup>7</sup> See *Gordon MacKay v. Union Bank* (1899), 26 O. A. R. 155. The giving of a cheque by a debtor to his creditors is a payment, at least where that creditor is his private banker: *Robinson v. McGillivray* (1906), 12 O. L. R. 91; 13 O. L. R. 232, 233; 38 S. C. R. 490; 39 S. C. R. 281.

<sup>8</sup> *Müller v. Reid* (1879), 4 O. A. R. 479.

<sup>9</sup> *Wright v. Fearnley* (1835), 5 Bing. N. C. 89, 96, 97.

<sup>10</sup> *Ponsford, Baker & Co. v. Union of London* (1906), 2 Ch. D. at 457; 75 L. J. Ch. 724; 13 Mans. 321.

<sup>1</sup> *Ex parte Richdale in re Palmer*, 19 Ch. D. 409; 51 L. J. Ch. 116.



rupt's creditors, to give notice to his bankers not to pay the cheque<sup>2</sup>. Section 32

Of the three words "contract, dealing, or transaction" in 32(d), the first is technical, the second less technical, and the third appears to have been inserted to give as large an operation as possible to any arrangement made *bona fide* with the bankrupt<sup>3</sup>. "Contract, dealing, or transaction with the bankrupt" means something done by him. The words do not point to a proceeding in which the bankrupt is merely passive<sup>4</sup>. A charging order being a proceeding *in invitum* is not a "transaction" protected by this section<sup>5</sup>. A payment into a bank is a "dealing" with the bankrupt, and may be protected under section 32 accordingly<sup>6</sup>. Where a builder contracted with a building club to erect some houses for them on their own land, with a stipulation in the contract that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work and to provide the requisite materials, and also to seize and retain all materials, plans and implements,

<sup>2</sup> *Ex parte Richdale in re Palmer, supra*.

<sup>3</sup> *Per* Cleasby, B., in *Krehl v. Great Central Gas Co.*, L. R. 5 Ex. 289, 294; 39 L. J. Ex. 197; a transaction is very much the same thing as a "dealing," *per* Lord Halsbury, in *re O'Shea's Settlement* (1895), 1 Ch. D. 325, 331; 64 L. J. Ch. 263; 2 Mans. 4; and see further as to the meaning of dealing or transaction; *Ex parte Arnold in re Wright* (1876), 3 Ch. D. 70; 45 L. J. Bank. 30; *Stansfield v. Cubitt* (1858), 27 L. J. Ch. 266. As to what is not a "dealing or transaction" see *Brewin v. Short*, 24 L. J. Q. B. 297.

<sup>4</sup> *Per* Lindley, L.J., in *re O'Shea's Settlement* (1895), 1 Ch. D. 325, at 331; 64 L. J. Ch. 263; 2 Mans. 4; but *semble*, a transaction may be held to have been "with the bankrupt," although he may not have been a party to every act by which it was carried out: *Krehl v. Great Central Gas Co.*, L. R. 5 Ex. 289, at 293; 39 L. J. Ex. 197.

<sup>5</sup> *Wild v. Southwood* (1897), 1 Q. B. 317; 66 L. J. Q. B. 166; 3 Mans. 303; in *re O'Shea's Settlement* (1895), 1 Ch. 325; 64 L. J. Ch. 263; 2 Mans. 4.

<sup>6</sup> *Ex parte The Atcham Board of Guardians in re Dickin* (1882), 46 L. T. 238. The giving of a cheque though it was post dated was held a "dealing": *Ex parte Richdale in re Palmer* (1881), 19 Ch. D. 409, at 416; 51 L. J. Ch. 116.



**Section 33** and the contractor after carrying on the work for some time filed a liquidation petition, it was held that the club were entitled as against the trustee in the liquidation to retain what they had seized, the seizure being a protected transaction<sup>7</sup>. *Semble*, the section extends to protect both express and implied contracts and will therefore protect a claim to a general lien<sup>8</sup>.

Recovering  
proceeds if  
reconveyed.

33. If a person in whose favour any settlement of property, conveyance or transfer which is void under this Act has been made, shall have sold, disposed of, realized on or collected the property so conveyed or transferred, or any part thereof, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee as such, who may recover such property or the value thereof from the person in whose favour such settlement of property, conveyance or transfer was made or from any other person to whom the person in whose favour such settlement of property, conveyance or transfer was made may have resold, redispensed of or paid over the proceeds of such property as fully and effectually as the trustee could have recovered the same if it had not been so sold, disposed of, realized on or collected. Provided that where any person to whom such property has been sold or disposed of shall have paid or given therefor in good faith fair and reasonable consideration he shall not be subject to the operation of this section but the trustee's recourse shall be solely against the person in whose favour such settlement was made for recovery of

<sup>7</sup> *In re Waugh ex parte Dickin* (1876), 4 Ch. D. 524; 46 L. J. Bank. 26; and see *Krehl v. The Great Central Gas Co.* (1870), L. R. 5 Ex. 289; 39 L. J. Ex. 197; contract, *Ex parte Jay in re Harrison* (1880), 14 Ch. D. 19.

<sup>8</sup> *Bowman v. Malcolm* (1843), 12 L. J. Ex. 397; 11 M. & W. 833.



the consideration so paid or given or the value thereof; and further provided that in case the consideration payable for or upon any sale or resale of such property or any part thereof shall remain unsatisfied the trustee shall be subrogated to the rights of the vendor to compel payment or satisfaction. Section 33

**Cross References Act:** Settlements avoided, 29; conveyance or transfer of property avoided, 31; power of trustee to sue, 20(1)(c), 16, *cf.* 35.

**Analogous Legislation:** Provincial Assignments Acts, R. S. O. 1914, c. 134, sec. 13; R. S. M. 1913, c. 12, s. 49; compare English Act, 1914, s. 44(2).

#### ANALYSIS OF NOTES.

Inconsistencies in the section.

Section only applies to three transactions void under the Act.

Rights of creditors apart from statute.

*Bona fide* purchasers for value protected in case of settlements.

Purchasers from fraudulently preferred creditors.

The section is modelled on provincial legislation with respect to assignments and preferences.

There are two inconsistencies in the section. Although the section commences with a reference to "any settlement of property, conveyance, or transfer" it is only the proceeds of "property so conveyed or transferred" which vests in the trustee. *Semble*, there is no statutory authority for the vesting in the trustee of the proceeds of settled property where the settlement is void under the Act. The second inconsistency occurs in the last part of the section. In cases where fair and reasonable consideration has been given in good faith, the recourse of the trustee is "solely against the person in whose favour such settlement was made". No mention is made of conveyances or transfers<sup>a</sup>. Inconsistencies in the section.

The proceeds can be followed by the trustee under the section only in cases of settlements, conveyances or transfers void under *The Bankruptcy Act*. The section only applies to three transactions void under the Act.

<sup>a</sup> See *Robinson v. Wilson* (1908), 12 O. W. R. 198, 768, where the effect of similar inconsistencies is discussed.



**Section 33** tion cannot it seems be invoked to permit the trustee to follow proceeds in the case of transactions which are contrary to *The Bank Act*<sup>10</sup>, or to transactions contrary to the Statutes of Elizabeth. It is thus narrower than the corresponding provincial section which extends to transactions "invalid against creditors". But within these limits the right to follow the proceeds is not limited to a case where the assignee has effected the sale<sup>1</sup>, but extends to cases where he has realized or collected the property<sup>2</sup>.

Rights of  
creditors  
apart from  
Statute.

Apart from statute the proceeds of fraudulently acquired property could not be followed unless they were ear-marked<sup>3</sup>. Under the Statute of Elizabeth the only remedy was the forfeiture of a year's value of the lands<sup>4</sup>. No doubt creditors will continue to enjoy certain rights under provincial legislation.

Bona fide  
purchasers  
for value  
protected in  
case of settle-  
ments.

The clause in the section which purports to protect purchasers in good faith for fair and reasonable consideration is similar to the law declared by the courts in construing the English counterpart of section 29, which deals with voluntary settlements. Void in section 29 has been construed as voidable<sup>5</sup>. The result of the cases is that a *bona fide* purchaser for value from the donee under a voluntary settlement acquires a good title as against the trustee in bankruptcy, even though he purchased with notice that the donee claimed

<sup>10</sup> *Conn v Smith* (1897), 28 O. R. 629.

<sup>1</sup> *Munro v. Standard Bank* (1913), 5 O. W. N. 508, 512.

<sup>2</sup> *Honsinger v. Kuntz* (1909), 14 O. W. R. 233, 238. See as to the accounting for moneys collected under a preferential assignment of book debts: *Meharg v. Lumbers* (1894), 23 O. A. R. 51. As to the question whether a creditor who has obtained possession of and disposed of property by means of a transaction void under the Act may set-off the proceeds against his debt, see *Robinson v. Wilson* (1908), 12 O. W. R. 198, 763, in which case the creditors had the property in the goods by virtue of a valid chattel mortgage which was in default.

<sup>3</sup> *Tennant v. Gallow* (1894), 25 O. R. 56; *Robertson v. Holland*, 10 O. A. R. 616; *Davis v. Wickson* (1882), 1 O. R. 369; *Stuart v. Tremain* (1883), 3 O. R. 190; *Masuret v. Stewart* (1892), 22 O. R. 290, 300; *Urguhart v. Aird* (1905), 6 O. W. R. 155, 506; but see *Martin v. McAlpine* (1883), 8 O. A. R. 675; *Beattie v. Holmes* (1898), 29 O. R. 264.

<sup>4</sup> *Davis v. Wickson* (1882), 1 O. R. 369; *Tennant v. Gallow* (1894), 25 O. R. 56.

<sup>5</sup> *In re Brall ex parte Norton* (1893), 2 Q. B. 381; 62 L. J. Q. B. 457; 10 Mor. 166; *In re Naylor ex parte Stephenson* (1893), 62 L. J. Q. B. 460; *In re Vansittart ex parte Brown* (1893), 1 Q. B. 181; 62 L. J. Q. B. 277; 9 Mor. 280.



## Section 34

under the settlement, provided he had not notice of any fact avoiding the settlement<sup>6</sup>, or of an act of bankruptcy committed by the settlor<sup>7</sup>; and this is so even though the purchase is subsequent to the date to which the title of the trustee relates back<sup>8</sup>. Trustees of a settlement originally valid which becomes void on the bankruptcy of the settlor are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duties as trustees<sup>9</sup>, *aliter* where the trust is void<sup>10</sup>.

The words "Provided that where any person to whom such property has been sold or disposed of shall have paid or given therefor in good faith fair and reasonable consideration he shall not be subject to the operation of this section", appear to refer grammatically to the words, "the property so conveyed or transferred". Consequently purchasers in good faith for reasonable consideration from creditors who have obtained a fraudulent preference appear to have statutory protection. In the case of voluntary settlements purchasers in good faith and for valuable consideration are protected under the English Act<sup>1</sup>.

Purchasers from fraudulently preferred creditors.

- 
- 34 (1) All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property whether real or personal, acquired by the bankrupt after the making of a receiving order shall, if completed before any intervention by the trustee, be valid against the trustee, and any

Dealings with undischarged bankrupt.

<sup>6</sup> *In re Brall ex parte Norton* (1893), *supra*; *In re Shrager* (1913), 108 L. T. 346.

<sup>7</sup> *In re Hart ex parte Green* (1912), 3 K. B. 6; 81 L. J. K. B. 1213; 19 Mans. 334; *In re Tankard ex parte O. R.* (1899), 2 Q. B. 57; 68 L. J. Q. B. 670; 6 Mans. 188.

<sup>8</sup> *In re Hart ex parte Green* (1912), *supra*; see previously *In re Carter & Kenderdines Contract* (1897), 1 Ch. 776; 66 L. J. Ch. 408; 4 Mans. 34.

<sup>9</sup> *In re Holden ex parte O. R.* (1887), 20 Q. B. D. 43; 57 L. J. Q. B. 47.

<sup>10</sup> *Smith v. Dresser* (1866), L. R. 1 Eq. 651; 35 L. J. Ch. 385.

<sup>1</sup> See *In re Vansittart ex parte Brown* (1893), 2 Q. B. 377; 62 L. J. Q. B. 279; 10 Mor. 44.



Section 34

estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction. For the purposes of this subsection, the receipt of any money, security, or negotiable instrument, from or by the order or direction of a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

Bank must  
notify  
trustee.

- (2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, or has made an authorized assignment, then, unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in the bankruptcy or authorized assignment proceedings of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee.

**Cross References Act:** Property defined, 2(*dd*) ; after acquired property of bankrupt, 25.

**Analogous Legislation:** English Act, 1914, s. 47 ; 1913, s. 11.

## ANALYSIS OF NOTES.

What property is included in, 34(1).

Transaction must be for value.

Disposition of after-acquired property in case of second bankruptcy.

Limitation of section 34(1).

Effect of intervention by trustee.



Section 34(2) is given in the form in which it stands by virtue of the amendment contained in section 56 of *The Bankruptcy Act Amendment Act, 1921*. The section requires further amendment by the insertion of the words "or authorized assignment proceedings" between the words "bankruptcy" and "unless" in the fourteenth line of the text. Section 34

Section 34 is a statutory recognition of the decision of the Court of Appeal in the leading case of *Cohen v. Mitchell*<sup>2</sup>. *Cohen v. Mitchell* decided that until the trustee intervenes, all transactions by an undischarged bankrupt after his bankruptcy, with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. The phrase "whether with or without knowledge of the bankruptcy" does not appear in section 34(1), but it is considered that the law as it existed under *Cohen v. Mitchell* and previous thereto<sup>3</sup>, has not been altered. The *bona fides* required by the section has reference only to the conduct of the person dealing with the bankrupt. If he has dealt in good faith the question of whether the bankrupt as between himself and the creditors is also dealing in good faith is immaterial<sup>4</sup>, for there is no obligation on persons dealing with an undischarged bankrupt to go to the trustee and make enquiries<sup>5</sup>. Thus an undischarged bankrupt may on his second marriage make a settlement of a *chose in action* which has fallen to him during bankruptcy, even where the trustees of the *chose in action* have knowledge of the bankruptcy<sup>6</sup>; for in such a case knowledge on the part of the trustees of the *chose in action* does not make them trustees for the trustee in bankruptcy<sup>7</sup>.

<sup>2</sup> (1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 7 Mor. 207; see *Hill v. Settle* (1917), 1 Ch. 319; 86 L. J. Ch. 243; 3 H. B. R. 23.

<sup>3</sup> See *Ex parte Dewhurst in re Vanlohe* (1871), L. R. 7 Ch. 185; 41 L. J. Bank. 18.

<sup>4</sup> *Hunt v. Fripp* (1898), 1 Ch. 675; 67 L. J. Ch. 377; 5 Mans. 105.

<sup>5</sup> *Hunt v. Fripp*, *supra*; *In re Bennett ex parte O. R.* (1907), 1 K. B. 149; see, however, *In re Clark ex parte Kearley* (1889), 6 Mor. 42.

<sup>6</sup> *In re Behrend's Trust* (1911), 1 Ch. 687; 80 L. J. Ch. 394; 18 Mans. 111.

<sup>7</sup> S. C.



## Section 34

What property included in 34(1).

Although the wording of the rule in *Cohen v. Mitchell* was wide enough to include all property real or personal, it was decided in *In re New Land Development Association and Gray*<sup>8</sup>, that the property of the bankrupt therein referred to did not include real estate<sup>9</sup>. Section 34(1), however, puts both real and personal after-acquired property on the same footing. It applies to after-acquired leaseholds<sup>10</sup>, to a legacy and a share of a residue under a will<sup>1</sup>; and to a *chose in action*<sup>2</sup>.

Transaction must be for value.

The transaction to be protected must be for value<sup>3</sup>. A third party who completes a contract into which the bankrupt had entered as purchaser and pays the purchase money and receives a deed in the name of the bankrupt, is entitled as against the trustee to a charge on the land to the extent of the money so paid<sup>4</sup>. A bankrupt who unknown to the trustee, carries on business and acquires property is not, when the trustee takes possession of the property, entitled to claim that he had acted as agent for the trustee and to demand an indemnity. But as to whether there is complete immunity of the trustee from all liability in respect of honest claims made in such case *quære*<sup>5</sup>. A charging order or other process *in invitum* is not a transaction for value within this section, and is therefore invalid as against the trustee<sup>6</sup>. A mortgagee of the bankrupt's share in a business is not a purchaser for value within section 34(1), merely because the business has con-

<sup>\*</sup> (1892), 2 Ch. 138; 61 L. J. Ch. 495.

<sup>8</sup> See also *O. R. v. Cooke* (1906), 2 Ch. 661; 75 L. J. Ch. 757; 13 Mans. 337; *In re Kent Co. Gas Co.* (1909), 2 Ch. 195; 78 L. J. Ch. 625; 16 Mans. 185; *London and County Contracts Co. v. Tallack* (1903), 19 T. L. R. 156; 51 W. R. 408.

<sup>10</sup> *In re Clayton & Barclay's Contract* (1895), 2 Ch. 212; 64 L. J. Ch. 615; 2 Mans. 345.

<sup>1</sup> *Hunt v. Fripp*, *supra*.

<sup>2</sup> *In re Behrend's Trust*, *supra*. After-acquired property should be distinguished from the proceeds of personal labour: see *Wadling v. Oliphant* (1875), 1 Q. B. D. 145; 45 L. J. Bank. 173; *In re Dowling ex parte Banks*, 4 Ch. D. 689; 46 L. J. Bank. 74, and see notes to section 25 under the side-note "personal earnings."

<sup>3</sup> *In re Bennett ex parte O. R.* (1907), 1 K. B. 149; 76 L. J. K. B. 134; 14 Mans. 6.

<sup>4</sup> *Bird v. Philpott* (1900), 1 Ch. 822; 69 L. J. Ch. 487; 7 Mans. 251.

<sup>5</sup> *In re Clark ex parte Kearley* (1889), 6 Mor. 42.

<sup>6</sup> *Hosack v. Robins* (1918), 2 Ch. 339.



tinued after the bankruptcy to have the benefit of a loan made prior to the bankruptcy<sup>7</sup>. Section 34

Property acquired by an undischarged bankrupt in a business carried on by him after his bankruptcy without the knowledge of the trustee will in the event of a second adjudication vest in the trustee under the first bankruptcy and not in the trustee under the second bankruptcy, for he is not a person dealing with the bankrupt for value<sup>8</sup>. The first trustee in claiming the profits of the business is not required to take with them the burden of the liabilities<sup>9</sup>. Disposition of after-acquired property in case of second bankruptcy.

It has been held that section 34(1) relates to cases in which the bankrupt is carrying on a business without any interference by the trustee, and is meant to protect persons who deal with him in the ordinary way. It does not protect a creditor who receives money from the debtor, which he had obtained in an irregular way<sup>10</sup>. However that may be it is clear that this section embodies a principle quite distinct from that of estoppel, such as occurs when the trustee allows the bankrupt to continue to deal with his property knowing that those dealing with the bankrupt are doing so relying on the fact of his apparent ownership<sup>1</sup>. Limitation of Section 34(1).

Reading section 34(1) with sections 25 and 6(3), it would appear that after-acquired property vests in the trustee in only a qualified sense. It is only when the trustee has intervened that it vests indefeasibly in him. Once he has intervened he cannot withdraw his intervention so as to divest the property from himself and revest it in the bankrupt<sup>2</sup>. Effect of intervention by trustee.

<sup>7</sup> *In re Rogers ex parte Collins* (1894), 1 Q. B. 425, 432; 63 L. J. Q. B. 178; 1 Mans. 387.

<sup>8</sup> *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806; 1 Mans. 207; and see in the case of insurance moneys *In re Phillips ex parte O. R.* (1914), 2 K. B. 689; 83 L. J. K. B. 1316; 21 Mans. 144.

<sup>9</sup> *In re Clark ex parte Beardmore* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806; 1 Mans. 207; but see *per Cave, J.*, in *In re Clarke ex parte Kearley* (1889), 6 Mor. 42.

<sup>10</sup> *In re Rogers ex parte Woodthorpe* (1891), 8 Mor. 236.

<sup>1</sup> See notes to section 21. and see *Ex parte Cooper in re Green* (1878). 39 L. T. 260, where the Chief Judge said there was no laches on the part of the trustee.

<sup>2</sup> *Hill v. Settle* (1917), 1 Ch. 319.



## Section 35

Proceedings  
by creditor  
when trustee  
refuses to  
act.

35. If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceeding after being duly required to do so, the creditor may, as of right, obtain from the court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate.

**Cross References Rules:** Matters to be heard in chambers, 4; application by motion, 14; rules with respect to motions, 15-19.

**Analogous Legislation:** Canadian Acts, 1875, s. 68; 1869, s. 45; *The Ontario Assignments Act*, 1914, s. 12(2); R. S. M. 1913, c. 12, s. 48(2).

## ANALYSIS OF NOTES.

Parties.  
Relief obtainable.  
Order and indemnity.  
Claim and full costs.  
Sale under order of court.

This section, which has no counterpart in the English *Bankruptcy Act*, had its origin in the earlier Canadian insolvency legislation and has been copied into *Provincial Assignments Acts*. The courts of bankruptcy in England have without any such statu-



tory provision allowed proceedings to be taken by a particular creditor in the name of the assignee for the benefit of the creditors generally<sup>3</sup> upon a proper indemnity being furnished<sup>4</sup>, but in England, and in winding-up cases which do not proceed under *The Bankruptcy Act*, there is no provision permitting a creditor to appropriate the fruits of the litigation in satisfaction of his claim<sup>5</sup>. Under the Ontario Act, a creditor may sue in the name of the assignee and with his consent without any order of the court; but in such case the recovery will be for the benefit of the estate<sup>6</sup>.

In an action by an assignee for the benefit of creditors against a creditor to set aside a preferential transfer or a fraudulent conveyance, it has been held that the debtor is not a proper party<sup>7</sup>, all his rights to the property having vested in the assignee<sup>8</sup>. It has been held that where proceedings are taken under such a section by a creditor on behalf of himself and all those who within a limited time shall come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security, join with the attacking Parties.

<sup>3</sup> *Ex parte Cooper in re Zucco* (1875), 10 Ch. 510; 44 L. J. Bank. 121; *Wilmott v. London Celluloid Co.* (1886), 34 Ch. D. 147; 56 L. J. Ch. 89.

<sup>4</sup> *In re Elston ex parte Ryland* (1832), 2 D. & C. 392, and see *Seear v. Lawson* (1886), 15 Ch. D. 426; 49 L. J. Bank. 69; *Guy v. Churchill* (1888), 40 Ch. D. 481; 58 L. J. Ch. 345.

<sup>5</sup> *Ex parte Cooper in re Zucco*, *supra*; *Wilmott v. London Celluloid Co.*, *supra*.

<sup>6</sup> *Doull v. Kopman* (1895), 22 O. A. R. 447; *MacDonald v. McCall* (1885), 12 O. A. R. 593; 13 S. C. R. 247. As to the right of simple contract creditors to sue see *MacDonald v. McCall*, *supra*; *Meriden Britannia Co. v. Braden* (1894), 21 O. A. R. 352. Before *The Judicature Act* a creditor had to resort both to Chancery and Common Law Courts in order to obtain his complete remedy. He had first to maintain a suit in equity to have the fraudulent conveyance declared void under the statute of Elizabeth. On obtaining a decree he was compelled to resort to a court of law for legal execution. If he required equitable execution he had again to resort to the Court of Chancery by means of a fresh suit in that court: *MacDonald v. McCall*, *supra*.

<sup>7</sup> *Beattie v. Wenger* (1897), 24 O. A. R. 72.

<sup>8</sup> *Crawford v. Magee* (1905), 6 O. W. R. 44, but see *Allen v. Bank of Ottawa* (1908), 11 O. W. R. 148. It is not, it seems, proper for a simple contract creditor to bring an action against an alleged fraudulent grantee alone, claiming merely to set aside the conveyance; the debtor and grantor should also be a party: *Gibbons v. Darvill* (1888), 12 P. R. 478; *Urquhart v. Aird* (1905), 6 O. W. R. 155, 506; *Kuntz Brewery v. Grant* (1911), 3 O. W. N. 237.



## Section 35

creditor in indemnifying the assignee, so that in the event of his failing to retain his security he may participate in the fruits of the litigation<sup>9</sup>. A creditor suing in the name of the trustee is *dominus litis* and can make any compromise he chooses with the defendant<sup>10</sup>.

Relief  
obtainable.

Under *The Bankruptcy Act* the trustee in bankruptcy has a statutory title which relates back<sup>1</sup>, and transactions which take place within the period covered by the relation back of the title of the trustee can be impeached if they are not protected by section 32. The rights of a creditor suing in the name of the trustee are not affected by acts done before action by the trustee in his personal capacity<sup>2</sup>, or in another right<sup>3</sup>. A trustee, and therefore a creditor suing in the name of the trustee, is not estopped from seeking to have a conveyance avoided as in fraud of creditors by reason of the fact that before the proceedings in insolvency have begun certain creditors suing on behalf of themselves and such other creditors as might contribute to the expenses of the suit had failed in a similar action<sup>4</sup>. If there is a valid and honest release or compromise of a right of action by the trustee, it will work a disqualification of any right of action in the trustee's name<sup>5</sup>, and the action of the trustee and inspectors in effecting a compromise under the Act will bind a dissentient creditor unless he takes direct steps to impeach it for some satisfactory reason<sup>6</sup>, which he cannot do unless the defendant can be restored to his original position<sup>7</sup>; for a compromise which may be impeached for fraud is not void but voidable only at the option of the party injured. If the defendant cannot be restored to his original position, the compromise cannot be

<sup>9</sup> *Barber v. Crathern* (1897), 28 O. R. 615.

<sup>10</sup> *Per* Burton, J.A., in *Donovan v. Herbert* (1885), 12 O. A. R. 298, 308.

<sup>1</sup> See sections 6(3), 25 and 4(10). As to the position of the trustee generally, see Chapter VI.

<sup>2</sup> *McTavish v. Rogers* (1896), 23 O. A. R. 17.

<sup>3</sup> *Glass v. Grant* (1888), 16 O. R. 233.

<sup>4</sup> *Smith v. Doyle* (1879), 4 O. A. R. 471.

<sup>5</sup> *Keyes v. Kirkpatrick* (1890), 19 O. R. 572.

<sup>6</sup> S. C. and *per* Hagarty, C.J.O., in *Campbell v. Hally* (1895), 22 O. A. R. 217.

<sup>7</sup> *Campbell v. Hally* (1895), 22 O. A. R. 217.



rescinded and the party defrauded is left to his action of deceit<sup>8</sup>. The section applies to cases in which there is an impeachable transaction alleged to be made in fraud of creditors<sup>9</sup>. A creditor may after execution of a release by him in consideration of payment of a composition bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment<sup>10</sup>. The action brought must be such as is justified by the scope of the order<sup>1</sup>. Section 35

The trustee should not appeal from the order authorizing the creditor to take proceedings<sup>2</sup>. In a case under the Ontario Act, where the creditor had indemnified the assignee, who stated that he was a resident of Winnipeg and not in a position to pay and did not intend to pay costs, and it appeared likely that the assignee would not facilitate the proceedings, he was directed to assign to the defendant the security which he had from the creditor<sup>3</sup>. Order and indemnity.

A creditor may not benefit by the proceedings beyond his claim and full costs<sup>4</sup>. After the creditor has obtained the order of the court authorizing him to take proceedings he may not by acquiring the claims of other creditors increase the amount he can recover<sup>5</sup>. *Semble*, the full costs allowed to a creditor include solicitor and client costs<sup>6</sup>. Where a creditor suing under the Statute of Elizabeth obtained a judgment setting aside as fraudulent a first mortgage, thereby improving the position of the second mortgagee, he was given a first charge on the fund recovered as in the nature of salvage for his solicitor and client costs and Claim and full costs.

<sup>8</sup> *Per Osler, J., in Campbell v. Hally, supra.*

<sup>9</sup> *Per Burton, C.J.O., in Small v. Henderson (1899), 27 O. A. R. 492.*

<sup>10</sup> *Doull v. Kopman (1895), 22 O. A. R. 447.*

<sup>1</sup> *Campbell v. Hally (1895), 22 O. A. R. 217.* A form of order is given in *Barber v. Crathern (1897), 28 O. A. R. 615.*

<sup>2</sup> *In re Lamb (1867), 13 Grant 391.*

<sup>3</sup> *Skill v. Lougheed (1912), 3 O. W. N. 647.*

<sup>4</sup> The amendment to this effect in the Ontario Act followed the decision in *McTavish v. Rogers (1896), 23 O. A. R. 17.*

<sup>5</sup> *McTavish v. Rogers (1896), 23 O. A. R. 17.*

<sup>6</sup> See *MacDonald v. McCall (1887), 12 P. R. 9*, where party and party costs were given as against the defendant and also solicitor and client costs to be paid out of the fund.



**Section 36** such of his party and party costs as might not be realized from the defendant<sup>7</sup>.

Sale under  
order of  
court.

Where a creditor proceeding under this section has obtained a declaration that the transaction attacked is fraudulent and void, and the trustee is directed by the court to sell the lands, such sale does not require the consent in writing, under section 20(1)(a), of the inspectors<sup>8</sup>.

### *Contributories to Insolvent Corporations.*

Insolvent  
corporations.

36 (1) This section shall apply only to corporations which have become bankrupt or authorized assignors under this Act.

Contributory  
shareholders.

(2) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise; such shareholder or member will hereinafter be referred to as the "contributory."

Amount pay-  
able to  
trustee.

(3) The amount which the contributory is liable to contribute shall be deemed an asset of the corporation and a debt payable to the trustee forthwith upon the making of a receiving order against the corporation or on the execution by the corporation of an authorized assignment.

Liability on  
transferred  
shares.

(4) If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the corporation for the purposes

<sup>7</sup> *Coursolles v. Fookes* (1889), 16 O. R. 691.

<sup>8</sup> *Herbert v. Donovan* (1885), Coutlée S. C. Dig. 1434, affirming *Donovan v. Herbert* (1885), 12 O. A. R. 298.



of this Act and shall be liable to contribute as aforesaid to the extent of his liabilities to the corporation or its members or creditors independently of this Act. Section 36

- (5) The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid. Payable to trustee.
- (6) The trustee may from time to time make demand on any contributory requiring him to pay to the trustee within thirty days from and after the date of the service of such demand, the amount for which such person is so liable to contribute or such portion thereof as the trustee deems necessary or expedient. Any such demand shall be deemed to have been properly served if delivered personally to the contributory or if a copy of the same is mailed in a registered prepaid letter addressed to the contributory at his last known address or at the address shown in or by the stock register or other books of the corporation. Demand on contributory by trustee.
- (7) If the contributory disputes liability, either in whole or in part, he shall within fifteen days from the service of such demand give notice in writing to the trustee stating therein what portion of the demand is disputed and setting out his grounds of defence and he shall not thereafter, unless by leave of the court, be permitted to plead in any action or proceeding brought against him by the trustee any grounds of defence of which he has not notified the trustee within said fifteen days. Notice of disputed liability.
- (8) If at the expiration of thirty days from the date of the service of such demand the contributory has not paid to the trustee the required amount, the trustee may take proceedings against the contributory for the recovery thereof in the manner provided by General Rules. Recovery.



**Section 36**

Excessive  
or unjust  
demand.  
Order of  
court.

Adjustment  
of rights of  
contribu-  
tories.

Court may  
allow re-  
munera-  
tion, ex-  
penses and  
costs as  
against  
contribu-  
tories.

Security for  
remunera-  
tion,  
expenses  
and costs.

- (9) If the contributory considers the demand excessive or unjust he may apply to the court to reduce or disallow it.
- (10) If the court considers the demand to be grossly excessive or unjust it may order the trustee to pay personally the costs of any such application.
- (11) The court shall, on the application of any contributory, adjust the rights of the contributories among themselves, and, for the purpose of facilitating such adjustment may direct the trustee to intervene, carry the proceedings, employ legal or other assistance and make such investigations, do such acts and furnish such information as to the court may seem necessary or advisable.
- (12) The court shall allow to the trustee and to any solicitor, advocate or counsel or other assistant employed by him under the provisions of the immediately preceding subsection, as against the contributories or any of them, such remuneration, expenses and costs as the court shall deem just, and such remuneration, expenses and costs shall be paid out of such moneys as shall be collected from contributories under the order or direction of the court for the purposes of the adjustment or out of moneys payable to the contributories by the estate of the debtor, as the court shall order, but such remuneration, expenses and costs shall not be payable in any event out of the general estate of the debtor.
- (13) The Court, before proceeding to adjust the rights of contributories among themselves as by subsection eleven of this section provided, may order that the contributory applying shall provide security, in form and amount satisfactory to the court, for the payment of such remuneration, expenses and costs as will be incident to such adjustment,



and, in default of such security being provided as and when ordered, the court may refuse to proceed with such adjustment. Section 36

**Cross References Act:** As to corporations which come under the Act see 2(*k*), 2(*o*), 2(*aa*); computation of time, 82; service by mail, 83; set-off, 28.

**Cross References Rules:** Contributories to insolvent corporations, 122 to 130.

**Cross References Forms:** Demand by trustee on contributory under section 36(6), Form 37; application of trustee for judgment against contributories, 38; application of contributory to adjust rights of contributories, 39; affidavit in support of application to adjust rights of contributories, 40.

**Analogous Legislation:** 36(2) (3) (5). See *Dominion Winding-up Act*, R. S. C. 1906, c. 144, s. 51; 36(4), see *Dominion Winding-up Act*, R. S. C. 1914, c. 144, s. 52; 36(11); see *Dominion Winding-up Act*, R. S. C. 1914, c. 144, s. 60.

Section 36(3) is in the form in which it has been left by the amendment made by section 57 of *The Bankruptcy Act Amendment Act*, 1921. Section 36(8) is in the form in which it was enacted by section 9 of *The Bankruptcy Act Amendment Act*, 1920<sup>9</sup>. Section 36(11) is in the form in which it was enacted by section 27 of *The Bankruptcy Act Amendment Act*, 1921<sup>10</sup>. Sections 36(12)(13) were first enacted by section 28 of *The Bankruptcy Act Amendment Act*, 1921.

Sub-sections 36(6) to 36(10) are machinery designed to replace the practice of settling the list of contributories before the Master. The whole section and Rules 122 to 130 have been drafted with a view to avoiding the costs and expense involved in proceeding under *The Winding-up Act*. Until the practice under the Act has been settled by judicial decision it has been decided to refer the practitioner to the leading works on Company Law for a discussion of the

<sup>9</sup> The previous section read:

36. (8) If at the expiration of thirty days from the date of the service of such demand the contributory has not paid to the trustee the required amount, the trustee may, with the approval of the inspectors of the estate, institute in a court having jurisdiction in debt to such amount, an action or other proceeding for the recovery thereof.

<sup>10</sup> The previous section read:

36. (11) The court shall, on the application of any contributory, adjust the rights of the contributories among themselves without the intervention of the trustee and without expense to the estate.



**Section 37** questions involved in the subject of contributories. The cases on sections 51, 52 and 60 of *The Winding-up Act*, which correspond with sections 36(2) to 36(5), will be found in those works.

### *Dividends.*

Trustee to  
pay dividends  
promptly.

37 (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee in bankruptcy or in authorized assignment proceedings shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts. Such dividend as can be paid shall be so paid within six months from the date of the receiving order or assignment, and earlier, if required by the inspectors. Thereafter a further dividend shall be paid whenever the trustee has sufficient moneys on hand to pay to the creditors ten per cent., and more frequently if required by the inspectors, until the estate is wound up and disposed of.

Abstract  
of receipts  
and disburse-  
ments.

(2) So soon as a final dividend sheet is prepared the trustee shall send by mail to every creditor (1) a notice of the fact, (2) an abstract of his receipts and expenditures as trustee, which abstract shall indicate what amount of interest has been received by the trustee for moneys in his hands, and (3) a copy of the dividend sheet with notice thereon (a) of the claims objected to and (b) whether any reservation has been made therefor. After the expiry of fifteen days from the date of the mailing of the last of said notices, abstracts and dividend sheets, dividends on all debts not objected to up to the time of payment shall be paid.

(3) Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled upon proof of



such debt to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Section 37

Right of creditor who has not proved debt before declaration.

- (4) Where one partner of a firm is adjudged bankrupt, or makes an authorized assignment, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt or authorized assignor until all the separate creditors have received the full amount of their respective debts.
- (5) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, on the application of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to work done for and the benefit received by each property.
- (6) The trustee may, at any time after the first meeting of creditors, give notice by registered mail prepaid to every person of whose claim to be a creditor with a provable debt the trustee has notice or knowledge, but whose said debt has not been proved, that if such person does not prove his debt within a period limited by the notice and expiring not sooner than thirty days after the mailing of the notice the trustee will proceed to make a dividend or final dividend without regard to

Dividends on separate property of bankrupt partner.

Dividends on joint and separate properties.

Notice that if claim not proved within 30 days, dividend or final dividend will be made.



Section 37

Court may  
extend time.

Final  
dividend and  
division of  
estate.

Distribution  
of estate of  
bankrupt  
after notice.

such person's claim. If any person so notified does not prove his debt within the time limited or within such further time as the court, upon proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of such person shall, notwithstanding anything in this Act, be excluded from all share in any dividend.

(7) The trustee having (a) gazetted and published as required by section eleven, subsection four, and (b) mailed as required by section forty-two, subsection two, and (c) realized all the property of the bankrupt or authorized assignor or all thereof that can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, and (d) settled or determined or caused to be settled or determined the claims of all creditors to rank against the estate of the debtor, shall make a final dividend and be at liberty subject to the various provisions of this Act, to divide the property of the debtor among the creditors who have proved their debts without regard to the claims of any other claimants.

(8) The trustee shall, not later than six months after he is at liberty pursuant to the provisions of this section to distribute the proceeds of the estate of the bankrupt or assignor, pay to the Receiver-General of Canada all declared but unpaid dividends remaining in his hands, and shall at the same time provide a list of the names and post office addresses, so far as known, of the creditors entitled, showing the respective amounts payable to the respective creditors. The Receiver-General shall, thereafter, upon application made, pay to any unpaid creditor his proper dividends as shown on



this list, and such payment shall have effect Section 37  
as if made by the trustee.

- (9) No action for a dividend shall lie against the trustee but if the trustee refuses to pay any dividend, the court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application. No action  
for dividend.
- (10) Notwithstanding the declaration of a final dividend if any assets reserved for contingent claims, or assets subsequently received, become available for the payment of a further dividend and the necessary expenses of declaring the same, the trustee shall declare and pay such further dividend. Dividend  
after final  
dividend.

**Cross References Act:** Division of property among creditors, 20(i)(j); dividend sheet and abstract of receipts and expenditures to be forwarded to Ottawa, 24(2)(c); debts provable, 44; proof of debts, 45, 46; ranking of claims where different estates, 28(2); applicability of assets where different estates, 51(3); retention of sums necessary for the costs of administration, 51(2); costs, charges and expenses of proceedings, 38; remuneration and disbursements of trustee, 40; fees and expenses of trustee, 51(1); penalty where trustee fails to perform any act or duty under the Act, 96(c); computation of time, 82.

**Cross References Forms:** Notice to persons claiming to be creditors of intention to declare final dividend and requiring them to establish Claim 41.

**Analogous Legislation:** 37(1)(2), English Act, 1914, s. 62; 37(3), English Act, 1914, s. 65; Ontario Assignments Act 1914, s. 33; 37(4)(5), English Act, 1914, s. 63(1)(2); 37(6)(7), English Act, 1914, s. 67(1)(2); 37(8), Manitoba Assignments Act, 1913, s. 62, as amended 1919, c. 7; 37(9), English Act, 1914, s. 68.

#### ANALYSIS OF NOTES.

Payment to creditors who have proved.

Dividend not liable to be attached.

The pooling of assets in Canada and abroad.

Notice of dividends, etc.

Joint and separate properties.

No action for dividend.

Section 37(3) is in the form in which it has been put by section 29 of *The Bankruptcy Act Amendment Act* of 1921, which inserted the words "upon proof of such debt" now appearing in the third and fourth lines of section 37(3) as given in the above text. Sec-



Section 37 tions 37(6) and 37(7) are in the form in which they were enacted by sections 30 and 31 of *The Bankruptcy Act Amendment Act*, 1921. Section 32 of *The Bankruptcy Act Amendment Act*, 1921, deleted the first 15 lines and the 16th line to and including the word "thereof" of section 37(8), as enacted by section 10 of *The Bankruptcy Act Amendment Act* of 1920<sup>10</sup>. Section 37(10) was first enacted by section 58 of *The Bankruptcy Act Amendment Act*, 1921.

<sup>10</sup> Sections 37(6) and 37(7) formerly read:

37. (6) When the trustee has realized all the property of the bankrupt, or authorized assignor, or so much thereof as can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice by registered prepaid letter posted to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice (which shall be within thirty days after the mailing or service of the notice), he will proceed to make a final dividend without regard to their claims.

37. (7) After the expiration of the time so limited, or, if the court on application by any such claimant grants him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt, or authorized assignor, shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

Section 37(8) as enacted by *The Bankruptcy Act*, 1919, read:

37. (8) Where a trustee has published the notice in the form and in the manner provided by section eleven, subsection four, of this Act and has mailed, prepaid and registered a copy of such notice to each creditor of the bankrupt or assignor of whom he has notice or knowledge, such trustee shall at the expiration of thirty days from the date of the mailing of the last of the said notices or from the date of last publication (whichever date should last occur) be at liberty to distribute the proceeds of the estate of the bankrupt or assignor among the parties entitled thereto, having regard only to the claims of which the trustee has then notice, and shall not be liable for the proceeds of the estate or assets or any part thereof so distributed to any person of whose claim the trustee had not notice at the time of the distribution thereof. The trustee shall, not later than six months after he is at liberty pursuant to the provisions of this section to distribute the proceeds of the estate of the bankrupt or assignor, pay to the Receiver-General of Canada all declared but unpaid dividends remaining in his hands, and shall at the same time provide a list of the names and post office addresses so far as known, of the creditors entitled, showing the respective amounts payable to the respective creditors. The Receiver-General shall, thereafter, upon application made, pay to any unpaid creditor his proper dividend as shown on such list, and such payment shall have effect as if made by the trustee.

This section was repealed by section 10 of *The Bankruptcy Act Amendment Act*, 1920, and the following substituted therefor:

37. (8) Where a trustee has published the notice in the form and in the manner provided by section eleven, sub-section four of this Act, and has mailed prepaid and registered a circular to each creditor of the



The provisions of section 37 are unfortunately not as clear as they might be; the very simple and concise provisions of the English Act have only in part been followed. Section 37(8), which is in part taken from *The Manitoba Assignments Act* 1913, s. 62, as amended by chapter 7 of the Acts of 1919, is in its present form the result of three amendments, one by the Senate to the original bill, one by *The Bankruptcy Act Amendment Act* 1920, and one by *The Bankruptcy Act Amendment Act* 1921. The word "final" in the first line of section 37(2) appears to have been inserted in error<sup>11</sup>.

The trustee is only required to pay dividends to those persons who have proved their debts<sup>1</sup>. He is not required to recognize the rights of an assignee of a creditor who has proved his debts. The assignee must prove<sup>2</sup>.

The trustee being responsible to the court for the due performance of his duties is not a debtor of the persons entitled to receive dividends, consequently a dividend is not a debt liable to be attached within the meaning of the English Order XLV., Rule 1<sup>3</sup>, nor is

bankrupt or assignor of whom he has notice or knowledge as provided by section forty-two, sub-section two, of this Act, such trustee shall at the expiration of thirty days from the date of the mailing of the last of the said circulars or from the date of last publication (whichever date should last occur) be at liberty to distribute the proceeds of the estate of the bankrupt or assignor among the parties entitled thereto, having regard only to the claims of which the trustee has then notice, and shall not be liable for the proceeds of the estate or assets or any part thereof so distributed to any person of whose claim the trustee has not notice at the time of the distribution thereof. The trustee shall, not later than six months after he is at liberty pursuant to the provisions of this section to distribute the proceeds of the estate of the bankrupt or assignor, pay to the Receiver-General of Canada all declared but unpaid dividends remaining in his hands, and shall at the same time provide a list of the names and post office addresses, so far as known, of the creditors entitled, showing the respective amounts payable to the respective creditors. The Receiver-General shall, thereafter, upon application made, pay to any unpaid creditor his proper dividends as shown on this list, and such payment shall have effect as if made by the trustee.

<sup>11</sup> See as to final dividend section 37(6) (7).

<sup>1</sup> For proof of debts see sections 45, 46.

<sup>2</sup> *In re Frost ex parte O. R.* (1899), 2 Q. B. 50; 68 L. J. Q. B. 663; 6 Mans. 194; and see *In re Riff* (1902), 51 W. R. 80; *In re Hills ex parte Lang* (1912), 107 L. T. 95.

<sup>3</sup> *Prout v. Gregory* (1889), 24 Q. B. D. 281; 59 L. J. Q. B. 118; 7 Mor. 1; and see in the case of a company in liquidation, *Spence v. Coleman* (1901), 2 K. B. 199; distinguishing *Ex parte Turner*, 2 D. F.



**Section 37** the surplus money due to the bankrupt after payment of one hundred cents on the dollar a "debt" which can be attached<sup>4</sup>. The court in England has no jurisdiction either at common law or under section 28 of *The Solicitors' Act* 1860, to charge a dividend with the costs of a solicitor through whose instrumentality the judgment debt was recovered on which the dividend is due<sup>5</sup>. But a trustee is entitled to retain a dividend against taxed costs which the creditor has been ordered to pay; and this even where the creditor before the dividend becomes payable has assigned for value his claim against the estate, and his assignees have proved in respect of the claim<sup>6</sup>.

Pooling  
assets in  
Canada and  
abroad.

It has been held that where a firm is bankrupt in England and abroad, and has English and foreign assets and English and foreign creditors, the court has jurisdiction to sanction an agreement between the trustee in bankruptcy in England and the official assignee abroad for pooling all the assets and distributing them rateably among the English and foreign creditors notwithstanding that *The Bankruptcy Act* 1883, contained no express provisions authorizing such a scheme<sup>7</sup>.

Sec. 37(2).  
Notice of  
dividend, etc.

Section 37(2) provides for notice of dividend only in the case of a final dividend, unless the first line of the section can be construed to mean "so soon as a dividend sheet is finally prepared"; a construction which accords better with good practice than does the more obvious construction. No forms have been provided in the Rules to correspond with the requirements of this section. Form 41 obviously refers to section 37(6). The abstract of receipts and disbursements and the dividend sheet called for by 37(2), must be mailed

& J. 354; and *Klauber v. Weill*, 17 T. L. R. 344. A different rule has been laid down in the case of an assignment for the benefit of creditors: *Ex parte Parker in re Howe* (1887), 12 P. R. 351.

<sup>4</sup> *Hunter v. Greensill* (1872), 42 L. J. C. P. 55; L. R. 8 C. P. 24.

<sup>5</sup> *In re Cook ex parte Cripps* (1899), 1 Q. B. 863; 68 L. J. Q. B. 597; 6 Mans. 185.

<sup>6</sup> *In re Mayne ex parte O. R.* (1907), 2 K. B. 899; 76 L. J. Q. B. 1086; 14 Mans. 261.

<sup>7</sup> *In re P. Maofadyen & Co. ex parte Vizianagaram Mining Co.* (1908), 1 K. B. 675; 77 L. J. K. B. 319; 15 Mans. 28.



to the Dominion Statistician, Department of Trade and Commerce, Ottawa, promptly after their preparation<sup>8</sup>. Section 37

A secured creditor is not compelled to prove his debt; he may decide to rely on his security. If he so decides, and then realizes his security he can come in and prove for the balance due<sup>9</sup>. *Semble*, a secured creditor who is a mortgagee of shares is not bound to watch the market so as to sell them at the highest price; and he does not by failing to sell at the most favourable opportunity lose his right to prove against the estate of the mortgagor<sup>10</sup>. Sec. 37(3).

The provisions of 37(4) should be read with 28(2), which deals with the ranking of claims where there are different estates and with 51(3) dealing with the applicability of assets of the different estates. Where a creditor holds a security to cover payment of both joint and separate debts he is entitled to apply the proceeds of the security in paying the two debts in any way he thinks fit<sup>11</sup>. Where there is no joint estate, a joint creditor is entitled to have his debt paid out of the separate estates of the individual partners *pari passu* with the separate creditors<sup>1</sup>; and *semble*, the question as to whether there is or is not joint estate is a matter of fact which may not always require to be evidenced by or depend upon a judicial declaration of insolvency or bankruptcy<sup>2</sup>. Sec. 37(4) (5)  
Joint and  
separate  
properties

Under *The Insolvent Act* of 1864, it would seem that an action for a dividend lay against the trustee<sup>4</sup>. Where a trustee has dividend moneys in hand creditors may apply to the court for an order that the trustee pay the dividend to which they are entitled, even though the trustee has been released from his trusteeship<sup>5</sup>; *aliter*, where the trustee has not the moneys in Sec. 37(9).  
No action for  
a dividend.

<sup>8</sup> Section 24(2) (c).

<sup>9</sup> *In re McMurdo, Penfield v. McMurdo* (1902), 2 Ch. 684; 71 L. J. Ch. 691, but see s. 46(1) (3).

<sup>10</sup> S. C.

<sup>11</sup> *Ex parte Dickin in re Foster* (1875), L. R. 20 Eq. 767; 44 L. J. Bank. 113.

<sup>1</sup> *In re Budgett Cooper v. Adams* (1894), 2 Ch. 557; 63 L. J. Ch. 817; 1 Mans. 230.

<sup>2</sup> *In re Carpenter ex parte Besley & Wilson* (1890), 7 Mor 270.

<sup>4</sup> *Simpson v. Newton* (1868), 4 U. C. L. J. N. S. 46.

<sup>5</sup> *In re Prager ex parte Societe Cockrill* (1876), 3 Ch. D. 115.



**Section 37** hand, having paid them over to the debtor for payment to the creditor<sup>6</sup>. A trustee may set-off against a creditor's dividend a claim for damages for wrongful detention of goods of the debtor<sup>7</sup>. A person who owes the estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share without first making his contribution<sup>8</sup>.

If a creditor takes a dividend he must be held to have taken it in the only character it can legally bear, that is as a dividend on an existing legal debt duly proved. Therefore a creditor who has proved for and accepted a dividend on a debt for the price of goods sold and delivered will not be allowed to succeed in an action for a return of the goods or their value on the ground that they were obtained by fraud and were not validly sold<sup>9</sup>.

Any distribution of dividends must be made subject to the provisions of sections 48 and 51 and of *The Income War Tax Act*<sup>10</sup>.

<sup>6</sup> *Ex parte Carter in re Ware* (1878), 8 Ch. D. 731.

<sup>7</sup> *In re Prager ex parte Société Cockrill*, *supra*, and see as to the withholding of a dividend from creditors who wrongfully detain part of the debtor's estate: *Ex parte Dobson* (1834), 1 Mont. & A. 666; *Ex parte Grimwood* (1836), 3 Mont. & A. 290; *Ex parte Acroyd*, 1 Gly. & J. 391.

<sup>8</sup> *In re Akerman, Akerman v. Akerman* (1891), 3 Ch. 212; 61 L. J. Ch. 34; *In re Rhodesia Gold Fields, Limited, Partridge v. Rhodesia Gold Fields, Limited* (1910), 1 Ch. 239; 79 L. J. Ch. 133; *In re National Live Stock Insurance Company* (1917), H. B. R. 119.

<sup>9</sup> *The Kin Tye Loong v. Seth et al.* (1920), B. & C. R. 89; 2 W. W. R. 450.

<sup>10</sup> Sections 7(9) (10) of *The Income War Tax Act*, 1917, c. 28, as enacted by 1920, c. 49, read:

7. (9) In cases wherein trustees in bankruptcy, assignees, liquidators, curators, receivers, administrators, heirs, executors and such other like persons or legal representatives are administering, managing, winding-up, controlling, or otherwise dealing with the property, business or estate of any person who has not made a return for any taxable period, or for any portion of a taxable period for which such person was required to make a return in accordance with the provisions of the Act, they shall make such return and shall pay any tax and surtax and interest and penalties assessed and levied with respect thereto before making any distribution of the said property, business or estate.

(10) Trustees in bankruptcy, assignees, administrators, executors and other like persons, before distributing any assets under their control, shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, surtax, interest and penalties properly chargeable against the person, property, business or estate, as the case may be, remains outstanding. Distribution without such certificate shall render



38. The debtor shall be entitled to any surplus remaining after payment in full of his creditors with interest as by this Act provided and of the costs, charges and expenses of the proceedings under the bankruptcy petition or under the authorized assignment.

Section 38

Right of debtor to surplus.

**Cross References Act:** Interest, 49, 51(5); payment in full by bond, 62(4); dividends, 37; "costs of administration," 51(2); "fees and expenses of the trustee," 51(1).

**Cross References Rules:** Costs and taxation, 54-61; fees, 62.

**Cross References Forms:** Tariff of costs, Part II.

**Analogous Legislation:** English Act, 1914, section 69, *Dominion Winding-up Act*, 1914, section 93.

The trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely for the payment of the creditors under the bankruptcy. Subject to that he is, it seems, trustee for the bankrupt of the surplus<sup>9</sup>; although as such trustee he is in a better position than an ordinary trustee, in that the bankrupt has not usually<sup>10</sup> the right of a *cestui que trust* to intervene until the surplus has been ascertained to exist, and all the creditors' interest and costs have been paid<sup>1</sup>. The bankrupt has a right to the surplus, and can dispose of it by will or deed or otherwise during the pendency of the bankruptcy even before the surplus is ascertained<sup>2</sup>. Under a receiving order after-acquired property goes to the trustee, and this may create a surplus; but there may be cases where there is a surplus apart from after-acquired

Rights of debtor in surplus.

the trustees in bankruptcy, assignees, administrators, executors and other like persons personally liable for the tax, surtax, interest and penalties.

<sup>9</sup> *Bird v. Philpott* (1900), 1 Ch. 822; 69 L. J. Ch. 487; 7 Mans. 251; *Charman v. Charman* (1808), 14 Ves. 580, 585; but see *Ex parte Sheffield in re Austin* (1879) 10 Ch. D. 434; *In re Leadbitter* (1878), 10 Ch. D. 388; 48 L. J. Ch. 242; 48 L. J. Q. B. 7.

<sup>10</sup> See in an exceptional case *Ex parte and in re Austin* (1876), 4 Ch. D. 13; 46 L. J. Bank. 1, and notes to section 25.

<sup>1</sup> *Ex parte Sheffield in re Austin* (1879), 10 Ch. D. 434; *In re Leadbitter*, *supra*, as explained in *Bird v. Philpott*, *supra*.

<sup>2</sup> *Bird v. Philpott*, *supra*; *In re Evelyn* (1894), 2 Q. B. 302; 63 L. J. Q. B. 658; 70 L. T. 692; 1 Mans. 195.



**Section 39** property<sup>3</sup>. Cases where the bankrupt has dealt with such a surplus are to be distinguished from cases where he deals with after-acquired property to which section 34 applies<sup>4</sup>. The trustee in a second bankruptcy takes the surplus and after-acquired property subject to whatever effective disposition the bankrupt has made of it<sup>5</sup>. It has been held that the surplus of a bankrupt's estate is not a "debt" that can be attached within the meaning of *The Common Law Procedure Act 1854*<sup>6</sup>.

Sharehold-  
ers.

In the distribution of surplus assets the holders of fully paid up shares will normally<sup>7</sup> be entitled to a preferential distribution of assets over those whose shares are not fully paid up to the extent necessary to equalize the payments on the shares<sup>8</sup>.

Preference shareholders have, apart from any restrictions in the memorandum and articles of association<sup>9</sup>, a right as corporators to participate in surplus assets<sup>10</sup>. A right to a preferential dividend will not carry a right to a preferential division of surplus assets<sup>1</sup>.

### *Appeals from Decisions of Trustee.*

Appeal to  
court against  
trustee.

39. If the debtor or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or

<sup>3</sup> *In re Evelyn*, *supra*, and see *Ex parte and in re Austin* (1876), 4 Ch. D. 13; 46 L. J. Bank. 1.

<sup>4</sup> See *Ex parte Rushford in re Adie* (1901), 84 L. T. N. S. 508.

<sup>5</sup> *Bird v. Philpott*, *supra*; *Ex parte Rushford in re Adie* *supra*.

<sup>6</sup> *Hunter v. Greensill* (1872), L. R. 8 C. P. 24; 42 L. J. C. P. 55.

<sup>7</sup> See where there were special terms in *Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490.

<sup>8</sup> *Ex parte Maude in re Hodges Distilling Co.* (1871), 6 Ch. 51, 55; *In re Weymouth & Channel Island Steam Packet Co.* (1891), 1 Ch. 66; *In re Wakefield Rolling Stock Co.* (1892), 3 Ch. 165; *In re Anglo-Continental Corporation of Western Australia* (1898), 1 Ch. 327, and see *In re Colonial Assurance Co., Ltd.* (1916), 29 D. L. R. 488.

<sup>9</sup> *Morrow v. Peterborough Water Co.* (1902), 4 O. L. R. 324.

<sup>10</sup> *Birch v. Cropper*, 14 A. C. 525; *In re Fraser & Chalmers, Ltd.* (1919), 2 Ch. 114; *In re Espuela Land and Cattle Co.* (1909), 2 Ch. 187; *In re London India Rubber Co.* (1867), 5 Eq. 519.

<sup>1</sup> *In re London India Rubber Co., supra*.



modify the act or decision complained of and make such order in the premises as it thinks just. Section 39

**Cross References Act:** Appeals from the decision of a court or judge, 74(2); power of court where body of persons with alternative powers, 88a.

**Cross References Rules:** Application to be by motion, 14-19.

**Analogous Legislation:** English Acts, 1914, s. 80; 1883, s. 90; Ontario Assignments Act, 1914, s. 28.

The court will not at the instance of a creditor interfere with the trustee's discretion in the realization of the estate unless it be shown that the trustee is acting unreasonably<sup>2</sup>. The fact that the bankrupt has an interest in the surplus will not give him or anyone claiming under him a right to interfere in the administration of the estate<sup>3</sup> or to apply to the court, except in an unusual case<sup>4</sup>. Decisions on the meaning of "aggrieved" are mainly on section 108 of the English Act, which deals with appeals from orders in bankruptcy matters. In section 74 of *The Bankruptcy Act* the word "dissatisfied" has been substituted for "aggrieved"<sup>5</sup>.

<sup>2</sup> *Ex parte Lloyd in re Peters* (1882), 47 L. T. 64.

<sup>3</sup> *Ex parte Sheffield in re Austin* (1879), 10 Ch. D. 434; *In re Lead-bitter* (1878), 10 Ch. D. 388; 48 L. J. Ch. 242; 48 L. J. Bank. 7.

<sup>4</sup> *In re and ex parte Austin* (1876), 4 Ch. D. 13; 46 L. J. Bank. 1.

<sup>5</sup> As to the meaning of aggrieved see particularly *per James, L.J.*, in *Ex parte and in re Sidebotham* (1879), 14 Ch. D. 458, 465, 466; 49 L. J. Bank. 41. In the following cases the person has been held to have been aggrieved; *Ex parte Thoday in re Ellis* (1876), 2 Ch. D. 229, 797; 45 L. J. Bank. 64; *Ex parte Learoyd in re Foulds* (1878), 10 Ch. D. 3; 48 L. J. Bank. 17; *Ex parte Sadler in re Whelan* (1879), 48 L. J. Bank. 43; *Ex parte Castle Mail Packets Co. in re Payne* (1886), 18 Q. B. D. 154; 3 Mor. 270; *In re Batten ex parte Milne* (1889), 22 Q. B. D. 685, 690; 58 L. J. Q. B. 338; 6 Mor. 110; *Re Langtry* (1894), 63 L. J. Q. B. 570; 1 Mans. 169; *In re Lamb ex parte Board of Trade* (1894), 2 Q. B. 805; 64 L. J. Q. B. 71; 1 Mans. 373 *In re Kitson ex parte Sugden & Son, Ltd.* (1911), 2 K. B. 109; 80 L. J. K. B. 1147; 18 Mans. 224; *In re Hosking* (1912), 106 L. T. 640; *In re a Debtor* (1912), 106 L. T. 344; 55 S. J. 689; and in the following cases the person has been held not to have been aggrieved: *Ex parte and in re Sidebotham* (1879), 14 Ch. D. 458; 49 L. J. Bank. 41; *Revell v. Blake* (1873), L. R. 8 C. P. 533; 42 L. J. C. P. 195; *Ex parte Brown in re Appleby* (1876), 2 Ch. D. 799; 45 L. J. Bank. 115; *Ex parte Ditton in re Woods* (1879), 11 Ch. D. 56; 40 L. T. 297; 27 W. R. 401; *Ex parte Mason in re White* (1880), 14 Ch. D. 71; 49 L. J. Bank. 56; *Ex parte Evans in re Orbell* (1881), 44 L. T. 762; 29 W. R. 573; *In re Jameson & Sandys ex parte Cresswell & Jameson* (1891), 8 Mor. 278.



**Section 40**

The Court has entertained an application under section 39 to restrain a proposed sale of the assets of an insolvent company to a shareholder of the company, although the offer to purchase had been accepted by the trustee and the majority of the inspectors<sup>6</sup>.

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*Remuneration of Trustee.*

Remuneration of trustee.

40 (1) The remuneration of the trustee in bankruptcy or in any other proceedings under this Act, for his services, excepting those rendered (a) upon the adjustment of the rights of contributories as among themselves, and (b) in connection with the application of a bankrupt or authorized assignor for a discharge, shall be such as is voted to the trustee by a majority of creditors present at any general meeting. In the excepted cases the trustee's remuneration shall be fixed by the court.

Limited to 5 per cent.

(2) Where the remuneration of the trustee has not been fixed under the next preceding subsection before the final dividend, the trustee may insert in the final dividend sheet and retain as his remuneration a sum not exceeding five per cent. of the cash receipts, subject to reduction by the court upon application of any creditor or of the debtor.

Not to exceed 5 per cent.

(3) The remuneration of the trustee for all services shall not under any circumstances exceed five per cent. of the cash receipts.

Disbursements to be taxed.

(4) The disbursements of a trustee shall in all cases be taxed by the prescribed authority unless such taxation is waived either by creditors at a general meeting called prior to the declaration of the final dividend, or by the inspectors.

**Cross References Act:** Appointment of trustees, 14; substitution of trustees, 15; resolution means ordinary resolution, 2(ff);

<sup>6</sup> *Imperial Bank of Canada v. Barber* (1921), 1 C. B. R. 485; 20 O. W. N. 282 (Middleton, J.).



ordinary resolution, 42(14), 2(z); priority of payment of fees and expenses of trustee, 51(1); final dividend, 37(6); employment of solicitor or other agent, 20(1)(d); 20(1)(c), 67; carrying on business of debtor, 20(1)(b); allowance to debtor, 21. **Section 40**

**Cross References Rules:** Application to court by motion, 14; taxation, 54-61; fees, 62

**Cross References Forms:** Tariff, Part II.

**Analogous Legislation:** Canadian Act, 1875, s. 43; 1869, s. 52; English Act, 1914, s. 82; Ontario Assignments Act, 1914, ss. 35, 36; R. S. M., 1913, c. 12, ss. 57-59.

Section 40(1) is in the form in which it was enacted by section 33 of *The Bankruptcy Act Amendment Act 1921*<sup>7</sup>.

The trustee can look only to the assets of the estate for his remuneration and disbursements and not to the creditors personally, unless they directly or impliedly promise to pay him<sup>8</sup>. A trustee who commits a fraud forfeits his right to costs out of the bankrupt's estate<sup>9</sup>. Trustee looks only to estate.

Where a certain rate of remuneration is voted by the creditors on the basis of which the trustee does work the creditors cannot of their own motion after the work has been done alter or qualify the terms of the resolution to the detriment of the trustee. If a mistake has been made in expressing the intention of the creditors, application should be made to the court to have the matter put right<sup>10</sup>. Once remuneration fixed creditors alone cannot alter terms.

It was held under the English Act of 1883, that a solicitor who acted as trustee, and who was allowed by the inspectors to charge "his proper professional Professional charges.

<sup>7</sup> The previous section read:

40. (1) The trustee in bankruptcy or in any other proceedings under this Act shall receive such remuneration as shall be voted to him by the creditors at any general meeting.

<sup>8</sup> *Johnston v. Dulmage* (1899), 30 O. R. 233; a trustee in the absence of misconduct is entitled to be recouped his costs, charges and expenses against the trust estate, even in the case of unsuccessful litigation: *Pitts v. LaFontaine*, 6 A. C. 482; (1881), 50 L. J. P. C. S; *Smith v. Beal* (1894), 25 O. R. 368, 377.

<sup>9</sup> *Ex parte Harper in re Pooley* (1882), 20 Ch. D. 685, 686; 51 L. J. Ch. 810.

<sup>10</sup> *In re Marsden ex parte Board of Trade* (1892), 9 Mor. 70, and see *In re Shirley ex parte Board of Trade* (1892), 9 Mor. 147 as to the principles which have been laid down for the guidance of the Board of Trade in supervising the charges to be allowed to trustees; and *In re Fleming* (1886), 11 P. R. 426, with respect to the remuneration of trustees under *The Ontario Trustee Act*.



**Section 41** charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in the bankruptcy" was only entitled to remuneration in the nature of a commission or percentage by virtue of section 72 of that Act<sup>11</sup>. A trustee who is a solicitor cannot make any profits as a solicitor on business done by himself or his firm in matters relating to the estate<sup>12</sup>.

The inspectors are to act on their own responsibility in making payments to the trustee on account of his charges. The trustee should not petition the Court for authorization to pay money to himself on account of fees<sup>13</sup>.

Cash  
receipts.

*Semble*, the maximum of five per cent. allowed to the trustee on the cash receipts means five per cent. on what is actually received by the trustee for the time being<sup>1</sup>.

In the absence of fraud the trustee is entitled to his costs in spite of the fact that the proofs of those who elected him trustee and authorized him to incur such costs have subsequently been expunged<sup>2</sup>.

### *Discharge of Trustee.*

Discharge of  
trustee.

41 (1) The court may by its order discharge an authorized trustee from his trusts and from further performance of all or any of his duties and obligations with respect to any estate, upon full administration of the affairs thereof or, for sufficient cause, before full administration. The court shall require proof of the extent of administration and (where there has not been full administra-

<sup>11</sup> *In re Wayman ex parte O. R.* (1889), 24 Q. B. D. 68.

<sup>12</sup> *In re Corsellis, Lawton v. Elwes* (1887), 37 Ch. D. 675; *Strachan v. Ruttan* (1892), 15 P. R. 109; *In re Kelly ex parte Sturdee* (1897), 17 C. L. T. Occ. N. 65 and see notes to section 43, Inspectors.

<sup>13</sup> *In re Cameron* (1921), 1 C. B. R. 450 (Panneton, J.).

<sup>1</sup> *In re Christie* (1900), 1 Q. B. 5; 69 L. J. Q. B. 31; 7 Mans. 1. Five per cent. was "thought sufficient" in a small assignment under *The Creditors' Trust Deeds Act* in *In re Ley et al.* (1900), 7 B. C. R. 94.

<sup>2</sup> *In re Jones ex parte Goatley* (1911), 56 Sol. J. 17. See s. 15(3) As to change of trustee. See also notes to section 53, on Inspectors.



tion) of the condition of the estate and of the alleged sufficient cause. Section 41

- (2) In particular the trustee shall be entitled to be discharged as aforesaid if, before full administration of the affairs of an estate, another trustee has been substituted for the trustee applying, the latter has accounted to the satisfaction of the inspectors or the court for all property of the estate which came to his hands and a period of three months has elapsed after the date of such substitution without any undisposed of claim or objection having been made by the debtor or any creditor; Discharge when another trustee has been appointed and account satisfactory.
- (3) When the trustee's receipts, disbursements and accounts have been approved in writing by the inspectors or the court, a period of two years has elapsed after payment of the final dividend and proof has been supplied that all objections, applications and appeals made by any creditor or the debtor have in the meantime been settled or satisfactorily disposed of, the affairs of the estate shall be deemed to have been fully administered; Discharge when accounts approved and two years have elapsed after final dividend.
- (4) The discharge of a trustee under the provisions of this section shall operate as a release of the special security provided pursuant to subsection eight of section fourteen of this Act; Special security released.
- (5) Nothing in or done under authority of this section shall relieve or discharge or be deemed to relieve or discharge a trustee from the results of fraud or any fraudulent breach of trust; Fraud or breach of trust.
- (6) The trustee shall finally dispose of all books and papers of the estate of the bankrupt or authorized assignor in manner prescribed by general rules. Disposal of books and papers.

**Cross References Act:** Substitution, removal or appointment of trustees, 15, 14(9)(10); general security, 14(4); special security, 14(8).



**Section 41**      **Cross References Rules:** Discharge of trustee, 107-111; disposition of books and papers, 110.

**Cross References Forms:** Application of trustee for discharge, 42; affidavit verifying application of trustee for discharge, 43; order discharging trustee, 44.

**Analogous Legislation:** Canadian Acts, 1875, ss. 47-48; English Act, 1914, s. 93, and Rule 340.

Section 41 is in the form in which it was enacted by section 34 of *The Bankruptcy Act Amendment Act of 1921*<sup>3</sup>.

Transmis-  
sion of  
interest.

Under the English Act the official receiver becomes trustee on the release of the trustee<sup>4</sup>. Our Act nowhere provides for the disposition of the estate on the death of the trustee, unless section 15(3) can be read as extending to such a case.

Court has  
jurisdiction  
notwith-  
standing  
discharge.

Even though a trustee has been released from his trusteeship, the court has jurisdiction to order him to pay to creditors who are entitled to it, dividend money which he has on hand<sup>5</sup>.

General  
security.

Where no special security has been provided the general security is available for creditors<sup>6</sup>. It was suggested in *Armstrong v. Foster*<sup>7</sup>, a case under *The Insolvent Act* of 1875, that the sureties to a general security are discharged by payment to anyone who recovers judgment against them.

<sup>3</sup> The previous section read:

41. (1) When the affairs of an estate have been fully administered, or, for sufficient cause, before full administration, an authorized trustee may, upon his own request, be discharged from further performance of all or any of his duties and obligations with respect to such estate.

(2) Such discharge may be granted by order of the court.

(3) The grant of such discharge (whether full or partial) shall operate as a release of the special security provided pursuant to subsection eight of section fourteen.

(4) The trustee shall finally dispose of all books and papers of the estate of the bankrupt or authorized assignor in manner prescribed by General Rules.

<sup>4</sup> Section 93(5).

<sup>5</sup> *In re Prager ex parte Societe Cockrill* (1876), 3 Ch. D. 115; 45 L. J. Bank. 124; cf. *Ex parte Carter in re Ware* (1878), 8 Ch. D. 731.

<sup>6</sup> *Letourneau v. Dansereau* (1886), 12 S. C. R. 307; *Armstrong v. Foster* (1884), 6 O. R. 129; see section 14(4) (5).

<sup>7</sup> (1884), 6 O. R. 129.



## PART IV.

## CREDITORS.

*Meetings of Creditors.*

- 42 (1) As soon as may be after the making of a receiving order against a debtor or after the making of an authorized assignment by a debtor, a general meeting of creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering the affairs of the debtor and to appoint inspectors and give directions to the trustee with reference to the disposal of the estate. Section 42  
Meetings of  
creditors.
- (2) It shall be the duty of the trustee to inform himself, by reference to the debtor and his records and otherwise, of the names and addresses of the creditors, and within five days from the date of the receiving order or assignment, to mail prepaid and registered to every creditor known to him a circular calling the first meeting of creditors at his office or some other convenient place to be named in the notice, for a date not later than fifteen days after the mailing of such notice. Notice of  
first meeting.
- (3) The trustee may at any time call a meeting of creditors; and he shall do so whenever requested in writing by twenty-five per cent. in number of the known creditors holding twenty-five per cent. in value of the known claims. But, after the first meeting he shall not be under obligation to give notice of any meeting to any creditors other than those who have proved their debts. Meeting of  
creditors  
by request.
- (4) Meetings other than the first thereof shall be called by mailing or otherwise giving Notice of  
subsequent  
meetings.



Section 42

notice of the time and place thereof to each creditor at the address given in his proof of claim.

Chairman  
of meetings.

- (5) At all meetings the chairman shall be such person as the meeting by resolution appoints, and he may with the consent of the meeting adjourn the meeting from time to time and from place to place.

Quorum.

- (6) A meeting shall not be competent to act for any purpose except the election of a chairman of and the adjournment of the meeting, unless there are present or represented at least three creditors, or all the creditors if their number does not exceed three.

Adjourn-  
ment.

- (7) If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven nor more than twenty-one days.

Minutes of  
meeting.

- (8) The chairman shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

Right of  
creditor to  
vote.

- (9) A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor, and the proof has been duly lodged with the trustee before the time appointed for the meeting.

Voting by  
secured  
creditor.

- (10) For the purpose of voting, a secured creditor shall unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and



shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. Section 43

- (11) A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, or by whom an authorized assignment has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof. Creditor secured by bill or note.
- (12) The chairman of the meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. He may, for the same purpose, notwithstanding anything in this Act, accept telegraphic or cable communication as proof of the debt of a creditor who carries on business out of Canada and likewise as to the authority of any one claiming to represent and vote on behalf of such creditor. If the chairman is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained. Power of chairman of creditors' meeting to admit or reject proof.
- (13) A creditor may vote either in person or by proxy deposited with the trustee at or before the meeting at which it is to be used. The trustee shall send to each creditor with the notice summoning the first meeting of creditors, a proxy in the form prescribed by General Rules; but neither the name of the trustee nor of any other person shall be printed or inserted in the proxy before it is Voting by proxy.



Section 42

Scale of  
votes.

so sent. A proxy shall not be invalid merely because it is in the form of a letter, telegram or cable.

- (14) Subject to the provisions of this Act, all questions at meeting of creditors shall be decided by resolution carried by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—

For every claim of or over twenty-five dollars and not exceeding two hundred dollars—one vote;

For every claim of over two hundred dollars and not exceeding five hundred dollars—two votes;

For every claim of over five hundred dollars and not exceeding one thousand dollars—three votes;

For every additional one thousand dollars or fraction thereof—one vote.

Claims  
acquired  
after assign-  
ment.

- (15) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

Secured  
creditor.

- (16) A secured creditor shall not be entitled to vote at any meeting of creditors until he has proved his claim and valued his security as hereinafter provided.

Trustee.

- (17) The trustee, if a creditor or a proxy for a creditor, may vote as a creditor at any meeting of creditors, and, in addition, in case of a tie, shall have a casting vote, personally, as if he were a creditor holding a proved claim of twenty-five dollars.

Corporation.

- (18) A corporation may vote at meetings of creditors as if a natural person, by an authorized agent.

- (19) The vote of the trustee, or of his partner, clerk solicitor, or solicitor's clerk, either as



creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

Section 42

No vote of trustee on remuneration.

**Cross References Act:** Resolution, 2(ff); ordinary resolution, 2(z); special resolution, 2(ii); inspectors, 43; debts provable, 44; proof of debts, 45; proof by secured creditors, 46; secured creditor defined, 2(gg); creditor in case of corporation, 2(m); meetings for composition, etc., 13(1)-(4); attendance of debtor at first meeting, 54(3) (4); publication of notice of first meeting, 11(4); service by mail, 83; signature of minutes by chairman, 77(1); evidence of regularity of proceedings, 77(2); duties and powers of trustee, 17 *et seq.*; remuneration of trustee, 40; debtor defined, 2(0); person defined, 2(k); corporation defined, 2(k); corporation may act by its officers, 85; trustee to keep minutes of proceedings, 23; trustee's books may be inspected by creditors, 23.

**Cross References Rules:** Meeting of creditors, 112-114; in case of composition, etc., 98, 99; proof of claims, 115, 116; disallowance of claims, 117, 118; valuation of contingent or unliquidated claims, 119; service and execution of process, 50-52; non-receipt of notice, 112(1); application to court to be by motion, 14; rules with respect to motions, 15-19.

**Cross References Forms:** Notice of first meeting where R. O. or A. A. made, 20; general proxy, 45; special proxy, 46; notice to debtor of meeting of creditors, 53; notice of meeting to appoint new trustee, 32; resolution appointing, etc., new trustee, 33; proof of debt, 47, 48; resolutions accepting composition, extension, etc., 25, 26; voting letter, 22; notice to creditors where debtor submits offer of composition, etc., 21.

**Analogous Legislation:** English Act, 1914, s. 13, 79(2); schedule, 1, *passim*; *Ontario Assignments Act*, 1914, ss. 21, 23 to 25; *Manitoba Assignments Act*, 1913, ss. 18 to 22; *Dominion Winding-up Act*, (1906), ss. 61-66.

#### ANALYSIS OF NOTES, SECTION 42.

- 42(2) First meeting.
- 42(5) Adjournment of meetings.
- 42(6) Quorum.
- 42(8) Duties of chairman.
- 42(9) Right of creditor to vote.
- 42(10) Position of secured creditor who votes in respect of whole debt.
- 42(11) Creditor must produce bill of exchange.
- 42(12) Rejection of proof.
- 42(14).

Section 42(12) is in the form in which it was enacted by section 35 by *The Bankruptcy Act Amendment Act 1921*<sup>6</sup>.

<sup>6</sup> The previous section read:

42. (12) The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a



## Section 42

Sec. 42(2).  
First  
meeting.

There is no express provision in *The Bankruptcy Act* or Rules giving power to the court to reconvene a first meeting of creditors; nor was there any such express authority in the Act of 1869; and yet the court from time to time has exercised a discretion to reconvene the meeting when owing to the subsequent rejection or admission of proofs or for other reasons the wishes of the creditors have not been ascertained; or where the court is of the opinion that the creditors should have an opportunity of reconsidering an improper resolution which had been passed; or where through some mistake no valid resolution has been passed<sup>7</sup>.

Sec. 42(5).  
Adjournment  
of meetings.

The wording of section 42(5) appears to negative the decision in *Ex parte Orde in re Horsley*<sup>8</sup>, in which it was held that there must be a formal resolution of adjournment if the adjournment is to be valid.

Sec. 42(6).  
Quorum.

Presumably the quorum must consist of creditors who are entitled to vote, that is to say who have proved their debts<sup>9</sup>.

Sec. 42(8).  
Duties of  
chairman.

It is no part of the duty of the chairman to take notes of the debtor's examination<sup>10</sup>.

Sec. 42(9).  
Right of  
creditor to  
vote.

The right of a creditor to vote at any meeting depends on proof of his debt<sup>1</sup>. Section 42(9) says that a creditor shall not be entitled to vote unless he has "proved a debt provable in bankruptcy". Creditors with contingent claims or claims for unliquidated damages may not vote until their claims have been valued by the court, for it is not until after such valuation that

creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

<sup>7</sup> *Ex parte Gibbs in re Webb* (1875), L. R. 10 Ch. 382; 44 L. J. Bank. 73; *Ex parte Cobb in re Sedley* (1873), L. R. 8 Ch. 727; 42 L. J. Bank. 63; *In re and ex parte Terrell* (1876), 4 Ch. D. 293; 46 L. J. Bank. 47; *Ex parte Solomon in re Tilley* (1882), 20 Ch. D. 281; 51 L. J. Ch. 677; *In re and ex parte McHenry* (1883), 24 Ch. D. 35; 53 L. J. Ch. 27; and compare under the *Companies Winding-up Act*, 1890, *In re Radford, Bright & Co.* (1901). 1 Ch. 272, 735; *In re Reynolds & Co.* (1895), W. N. 31, but see *Ex parte Bournier in re Bradley*, 54 Sol. J. 444, and see *infra* notes to s. 42(17).

<sup>8</sup> L. R. 6 Ch. 881; 40 L. J. Bank. 60.

<sup>9</sup> See *infra*, notes to s. 42(9).

<sup>10</sup> *Ex parte Solomon in re Tilley* (1882), 20 Ch. D. 281; 51 L. J. Ch. 677.

<sup>1</sup> Section 42(9) (16).



such a claim is deemed a proved debt for the purposes of the Act<sup>2</sup>. Section 42

Section 42(10) requires a secured creditor to state in his proof particulars of his security and to assess it, and permits him to vote only in respect of the balance due him after deducting the value of his security<sup>3</sup>. Section 42(16), says that a secured creditor is not entitled to vote at any meeting of creditors until he has proved his claim and valued his security. In spite of these requirements the case is bound to arise of a creditor who is in fact a secured creditor proving his debt without mentioning his security and voting in respect of his whole debt. The last part of Rule 10 of Schedule I. of the English Act provides for this case:—

Sec. 42(10).  
Position of  
secured  
creditor who  
votes in  
respect of  
whole debt.

“If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence”.

This provision has been omitted from 42(10), which corresponds with the first part of Rule 10 of Schedule I. The result is to make it necessary to resort to the practice prior to the Act of 1883. It was held under *The Bankruptcy Act* of 1869, that where a secured creditor votes without producing his security or mentioning it in his proof, his vote is valid, but his security is forfeited for the benefit of the estate<sup>4</sup>. But this rule is, it seems, subject to the qualification that a secured creditor who has by mistake omitted from his debt a part of his security, may be allowed to rectify his proof<sup>5</sup>. The principle on which rectification will

<sup>2</sup> Section 44(3) and see under the old statutes *Ex parte Simpson* (1744), 1 Atk. 70, mentioned in *Ex parte Ruffle in re Dumelow* (1873), L. R. 8 Ch. 997; 42 L. J. Bank. 82; *In re Canadian Pacific Colonization Co., Ltd.* (1891), W. N. 122; *Ex parte Kimber in re Thrift*, 11 Ch. D. 869; *Ex parte Boler*, 1 M. D. & D. 602; *Ex parte Knight*, 2 M. & A. 545; *Ex parte Beasley*, 2 M. & A. 632.

<sup>3</sup> See sections 45 and 46, particularly 46(3), as to the rules with respect to valuation of securities on proof of debts. See notes to section 46 with respect to withdrawal of proof by a secured creditor.

<sup>4</sup> *Ex parte Ashworth in re Hoare* (1874), L. R. 18 Eq. 705; 43 L. J. Bank. 143; and see *Ex parte Solomon*, 1 Gly. & J. 25, and *Ex parte Downes*, 1 Rose 96; *Ex parte Wood in re Wright* (1879), 10 Ch. D. 554; but see *Box v. Bird's Hill Land Co.* (1913), 24 W. L. R. 706; 23 M. L. R. 415.

<sup>5</sup> *Ex parte Bagshaw in re Ker* (1879), 13 Ch. D. 304; *Ex parte Schofield in re Firth* (1879), 12 Ch. D. 337, at p. 345; 48 L. J. Bank.



**Section 42** be allowed depends on whether the creditor has elected to abandon his security. If what he has done has been done accidentally he ought, on such terms as the court may think fit to impose, to be relieved from the loss of his security. If the creditor has balanced the advantages and deliberately elected to prove in that way there is no inadvertence. It is a question of fact<sup>6</sup>. Where a creditor omits to value his security by reason of erroneous information leading him to suppose it to be worthless there is not an omission to value from inadvertence<sup>7</sup>. A statement that a security is worthless is not an omission to value<sup>8</sup>. The fact that mortgagees have valued their security before discovering that certain property intended to be included in the security had been omitted by mistake will not estop them from applying to the proper court for rectification of the mortgage security<sup>9</sup>. The "security" which must be mentioned in the proof has been construed to mean what are usually called securities, although it may subsequently turn out that they are not subsisting securities<sup>10</sup>.

122; and see notes to section 45 as to rules with respect to proof of secured creditors.

<sup>6</sup> *In re Burr ex parte Clarke* (1892), 67 L. T. 465; *In re Safety Explosives, Ltd.* (1904), 1 Ch. 226; 73 L. J. Ch. 184; 11 Mans. 76; *In re King ex parte Mesham* (1885), 2 Mor. 119; and see *In re Rowe ex parte West Coast Goldfields, Ltd.* (1904), 2 K. B. 489; 73 L. J. K. B. 852, where it was held that there had been an election. Under the English practice if a creditor proves in respect of part of a debt covered by a security, and votes, he is deemed to have surrendered the whole security; and he cannot by subsequent proof for these debts make any claim to be entitled to the value of this security: *In re Pawson ex parte Trustee* (1917), 2 K. B. 527; 86 L. J. K. B. 1285; (1917), H B. R. 87.

<sup>7</sup> *In re and ex parte Piers* (1898), 1 Q. B. 627; 67 L. J. Q. B. 519; 5 Mans. 97.

<sup>8</sup> S. C.

<sup>9</sup> *Cameron v. Kerr* (1876), 23 Gr. 374.

<sup>10</sup> As for example a bill of exchange or acceptance by the debtor: *In re Ruthen ex parte Kidd* (1898), 5 Mans 227, and see *Ex parte Ashworth in re Hoare* (1874), L. R. 18 Eq. 705; 43 L. J. Bank. 143. But bills of exchange indorsed by a customer to his banker in order that they may be discounted and held by the banker "pending discount," i.e. pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities which the banker is bound to value; for the bills no longer remain part of the customer's estate: *Ex parte Schofield in re Firth* (1879), 12 Ch. D. 337; 48 L. J. Bank. 122; as explained in *Dawson v. Isle* (1906), 1 Ch. 633; 75 L. J. Ch. 338. It has been held that



The established practice in bankruptcy is that a creditor who holds a bill of exchange as security must produce the bill both when he comes to prove his debt and also when he comes to receive a dividend. If by some accident a creditor is unable to produce his security the judge has a discretion in the matter<sup>1</sup>.

**Section 42**  
Sec. 42(11).  
Creditor  
must pro-  
duce bill of  
exchange.

On an appeal from a rejection of a proof the debtor has no *locus standi* to appear and cross examine the creditor<sup>2</sup>.

Sec. 42(12).  
Rejection of  
proof.

The debtor's statement of affairs should be ready for presentation to the first meeting. See section 54.

Statement  
of affairs.

Section 42(14), provides that subject to the provisions of the Act all questions at meeting of creditors shall be decided by resolution carried by the majority of votes. It was decided under sections 14 and 20 of the Act of 1869, that even where there was no fraud in the passing of a resolution, yet if the majority of the creditors voted not simply with the view of administering the estate in the best way for the benefit of all the creditors, but with the view of favouring the debtor or other persons whom he was alleged fraudulently to have preferred, the court had jurisdiction to direct the trustee to disregard the resolution<sup>3</sup>. When at a meeting of creditors there is not present a majority of all the creditors the supposition is that the absentees are prepared to accept the opinion of the majority of those present<sup>4</sup>.

Sec. 42(14).

a banker in such case is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided he does not receive in the whole more than 20s. in the pound: *Ex parte Schofield in re Firth*, *supra*.

<sup>1</sup> *Ex parte Jacobs in re Carter* (1874), L. R. 17 Eq. 575; 43 L. J. Bank. 46, and see *Ex parte Ashworth in re Hoare* (1874), L. R. 18 Eq. 705; 43 L. J. Bank. 143.

<sup>2</sup> *In re Knight ex parte Smith* (1884), 1 Mor. 74; and see further as to appeal from the Chairman's decision: *Ex parte Valentine in re Smith* (1910), W. N. 23; 54 Sol. J. 215.

<sup>3</sup> *Ex parte Cocks in re Poole* (1882), 21 Ch. D. 397; 52 L. J. Ch. 63; and see *In re and ex parte Page* (1876), 2 Ch. D. 323; *Ex parte Strawbridge in re Hickman* (1883), 25 Ch. D. 266; 53 L. J. Ch. 323. See as to the relationship between court and liquidator: *In re Albert Life Assurance Co.* (1871), L. R. 6 Ch. 381; *In re East of England Banking Co., Pearson's Case* (1872), L. R. 7 Ch. 309; *In re Sun Lithographing Co.* (1893), 24 O. R. 200, and see *supra* notes to section 42(2).

<sup>4</sup> *La Banque d'Echange du Canada v. Campbell* (1885), 15 R. L. 373.



*Inspectors.***Section 43**

Appointment  
of inspectors,  
revocation  
and remun-  
eration.

Inspectors'  
fees.

- 43 (1) At the first or a subsequent meeting the creditors shall appoint one or more, but not exceeding five, inspectors of the administration by the trustee of the estate of the debtor.
- (2) The powers of inspectors may be exercised by a majority of them.
- (3) The creditors may, at any meeting, revoke the appointment of any inspector and in such event or in case of the death, resignation, or absence from the province of an inspector, may appoint another in his stead.
- (4) Each inspector may be repaid his actual and necessary travelling expenses incurred in and about the performance of his duties, and may also be paid the following fees:—

				Fee per meeting.
Estates with assets below \$	5,000.....			\$2.00
" " " from	5,000 to \$ 15,000..			3.00
" " " "	15,000 to 30,000..			4.00
" " " "	30,000 to 50,000..			5.00
" " " "	50,000 to 100,000..			7.50
" " " "	100,000 and over....			10.00

- (5) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference which cannot be so resolved it shall be resolved by the trustee, unless it concerns his personal conduct or interest.
- (6) No inspector shall be capable of, directly or indirectly, purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, unless with the prior approval of the court.

Inspector  
may not  
acquire  
property.

**Cross References Act:** Meetings of creditors, 42; powers exercisable with permission of inspectors, 20, 21, and see 17(3); jurisdiction of court where body of persons and court given alternative powers, 88a.

**Analogous Legislation:** Canadian Acts, 1875, s. 35; 1869, s. 34; English Acts, 1914, s. 20; 1913, s. 17; 1883, s. 22; 1890, s. 5; Ontario Assignments Act, 1914, ss. 22, 37.



## ANALYSIS OF NOTES.

Inspectors under English Act.

Inspector is in a fiduciary relation to creditors.

A trustee may not make any profit out of his trust.

Inspector in employ of proposed solicitor to trustee.

Fees where fault in election of inspector.

Inspectors for joint and separate estate.

## Section 43

Subsection 43(4) is in the form in which it was enacted by *The Bankruptcy Act Amendment Act 1920*<sup>5</sup>. Section 43(6) was first enacted by section 36 of *The Bankruptcy Act Amendment Act 1921*.

Under the English Act only a creditor or a holder of a general proxy or a general power of attorney from a creditor is qualified to act as a member of the committee of inspection<sup>6</sup>. Under the English Act of 1883, it was held that the only creditor could not appoint himself a committee of inspection, and that therefore the authorization of such creditor did not empower the trustee to employ a solicitor<sup>7</sup>. It should be noted, however, that under that Act a committee of inspection consisted of not more than five nor less than three members<sup>8</sup>, and that where there was no committee of inspection any permission required to be given by the committee of inspection might be given by the Board of Trade<sup>9</sup>. Under section 91 of the English Companies Act 1862, the court has an almost unlimited power as to ordering meetings of creditors or contributories to be summoned; and may exercise this power where a large creditor has not been represented among the inspectors by reason of the fact that his claim was not proved at the time of the first meeting of creditors<sup>10</sup>.

The inspectors represent all the creditors and should perform their duties impartially<sup>11</sup>.

<sup>5</sup> The previous subsection read: "(4) Each inspector may be repaid his actual and necessary travelling expenses incurred in and about the performance of his duties, and such sums only."

<sup>6</sup> Section 20(2) and see *In re Jones ex parte Goatly* (1911), 56 Sol. J. 17.

<sup>7</sup> *In re Geiger* (1915), W. N. 7.

<sup>8</sup> Section 22(1).

<sup>9</sup> Section 22(9).

<sup>10</sup> *In re Radford, Bright & Co.* (1901), 1 Ch. 272, 735.

<sup>11</sup> See *Imperial Bank of Canada v. Barber* (1921), 1 C. B. R. 485; 20 O. W. N. 252 (Middleton, J.).



## Section 43

Inspector is  
in a fiduciary  
relation to  
creditors.

An inspector, though not an express trustee, is in a fiduciary relation to the general body of creditors, and may not become a purchaser of any part of the estate, except upon the condition of making full disclosure of all material facts within his knowledge; giving full credit for the value of his bargain; and obtaining the consent of the creditors<sup>1</sup>. Nor it seems can the inspectors give the trustee permission to purchase<sup>2</sup>. But where the proposed transaction is for the benefit of the creditors the court may sanction the sale of the property of the bankrupt to the nominee of an intended company notwithstanding the fact that the trustee and inspectors have been concerned in the promotion of the company, and may be interested in it as shareholders, directors and officers<sup>3</sup>. Such sanction must be given before the business from which the profit is to be derived is undertaken; it cannot be given after the profit has been derived<sup>4</sup>. As there may not be a sale to a partner of a trustee<sup>5</sup>, so it seems there may not be a sale to a partner of an inspector, there being no rule under *The Bankruptcy Act*, which would permit of such a decision as that given in *In re and ex parte Gallard*<sup>6</sup>.

A trustee  
may not  
make any  
profit out of  
his trust.

It is a well established rule that a trustee who is a solicitor cannot make any profits as a solicitor on business done by himself or by his firm in matters relating to the estate; but from this rule an exception has been established by *Cradock v. Piper*<sup>7</sup>, that is to say that

<sup>1</sup> *Taylor v. Davies* (1920), A. C. 636, 647; and see *Gastonguay v. Savoie* (1899), 29 S. C. R. 613; *Segsworth v. Anderson* (1895), 24 S. C. R. 699; *Morrison v. Watts* (1892), 19 O. A. R. 622, 631; *In re Canada Woollen Mills* (Long's Appeal) (1905), 9 O. L. R. 367; 5 O. W. R. 265; 24 C. L. T. 396; *Thompson v. Clarkson* (1891), 21 O. R. 421; *Brigham v. Banque Jacques Cartier* (1900), 30 S. C. R. 429; *Cartier v. Genser* (1902), 22 C. L. T. Occ. N. 416; as to an exceptional case see *Shantz v. Clarkson* (1913), 4 O. W. N. 1303.

<sup>2</sup> *Morrison v. Watts*, *supra*, a case under *The Ontario Assignments Act* where, however, the inspectors do not occupy the same position as under *The Bankruptcy Act*. See sec. 27 (d).

<sup>3</sup> *Ex parte Slater in re Spink* (No. 1), 108 L. T. 572.

<sup>4</sup> *Ex parte and in re Gallard* (No. 1) (1896), 1 Q. B. 68; 65 L. J. Q. B. 199; 2 Mans. 515.

<sup>5</sup> *Ex parte Moore* (1882), 51 L. J. Ch. 72.

<sup>6</sup> (1897), 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52, where it was held that Rule 316 of the Bankruptcy Rules of 1886 permitted a sale to the partner of a member of the committee of inspection.

<sup>7</sup> (1850), 1 Mac. & G. 664; L. J. 19 Eq. 107.



where work is done in a suit not on behalf of the trustee who is a solicitor, alone, but on behalf of other parties or of himself and his co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs if the costs of appearing for and acting for the two trustees have not increased the expense over that which would have been incurred if he or his firm had appeared only for his co-trustee<sup>8</sup>. Thus in winding up proceedings a director is entitled to profit costs in respect of cases in court conducted by him as solicitor of the company, that is as solicitor for himself and his co-directors; but not in respect of business done out of court<sup>9</sup>. The general rule is that a solicitor who is one of the inspectors, and who does work for the estate in his professional capacity cannot receive more than his out-of-pocket disbursements. He is not entitled to include a proportion of his general office expenses as part of his disbursements<sup>10</sup>. Similarly an inspector who furnished paper to a newspaper which was being carried on under a creditor's deed, was only allowed to charge the cost price<sup>1</sup>.

Section 43

Where one of the inspectors is the managing clerk of a solicitor it has been held in England that it would on general principles be improper to appoint the solicitor to be solicitor to the trustee in the bankruptcy<sup>2</sup>.

Inspector in employ of proposed solicitor to trustee.

*Semble*, in the absence of fraud an inspector is entitled to be paid his fees and expenses in spite of the fact that the proofs of those who elected him trustee have been subsequently expunged<sup>3</sup>.

Fees where fault in election of inspector.

The English Rule 294, provides that: "Each set of separate creditors may appoint its own committee of inspection, but if any set of separate creditors do

Inspectors for joint and separate estate.

<sup>8</sup> *In re Corsellis, Lawton v. Elwes* (1887), 37 Ch. D. 675; *Strachan v. Ruttan* (1892), 15 P. R. 109, distinguishing *Smith v. Graham*, 2 U. C. Q. B. 268.

<sup>9</sup> *In re Mimico Sewer Pipe & Brick Mfg Co., Pearson's Case*, 26 O. R. 289.

<sup>10</sup> *Ex parte and in re Gallard* (No. 1) (1896), *supra*; *in re Mimico Sewer Pipe & Brick Mfg. Co., Pearson's Case*, *supra*; and see *Collins v. Carey* (1839), 2 Beav. 128; *Christophers v. White* (1847), 10 Beav. 523; and see cases collected in *Stones v. Parker* (1846), 9 Beav. 385, 388 note (a).

<sup>1</sup> *Chaplin v. Young* (1864), 33 Beavan 414.

<sup>2</sup> *Ex parte and in re Gallard* (No. 1) (1896), *supra*.

<sup>3</sup> *In re Jones ex parte Goatly* (1911), 56 Sol. J. 17.



Section 44 not appoint a separate committee, the committee (if any) appointed by the joint creditors shall be deemed to have been appointed also by such separate creditors." There is no similar rule under *The Bankruptcy Act*. Prior to the Acts of 1849 and 1861, it was the practice when proper application had been made for that purpose for the court to permit a meeting of the separate creditors to nominate inspectors to protect the interest of the separate creditors<sup>4</sup>. That jurisdiction continued in England under the Act of 1861<sup>5</sup>. Rule 60 which permits the trustee to pay such costs and charges as cannot be paid out of the joint estate out of the separate estates "with the consent of the inspectors of the estates out of which the payment is intended to be made" seems to contemplate inspectors for each estate<sup>6</sup>.

### *Debts Provable.*

Debts  
provable.

- 44 (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorized assignment.
- (2) Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.
- (3) The court shall value, at the time and in the summary manner prescribed by General

<sup>4</sup> *Ex parte Wilson* (1840), 1 M. D. & D. 68; *Ex parte Wright* (1841), 2 M. D. & D. 434, and see *Ex parte Miles* (1814), 2 Rose 68.

<sup>5</sup> *Ex parte Melbourne* (1871), L. R. 6 Ch. 835; 25 L. T. N. S. 368.

<sup>6</sup> Also see Rule 114.



Rules, all contingent claims and all such Section 44  
 claims for unliquidated damages as are  
 authorized by this section, and after, but not  
 before, such valuation, every such claim  
 shall for all purposes of this Act, be deemed  
 a proved debt to the amount of its valuation.

**Cross References Act:** Proof of debts, 45; proof by secured creditors, 46; disallowance of claims, 53; debts payable at a future time, 50; interest, 49; proof in certain cases under marriage contracts, etc., 29(2) (3); restricted creditors, 48.

**Cross References Rules:** Valuation of contingent or unliquidated claims, 119.

**Cross References Forms:** Proof of debt, 47; proof of debt of workmen or others, 48.

**Analogous Legislation:** English Acts, 1914, s. 30; 1883, s. 37; 1869, s. 31; Canadian Acts, 1875, ss. 80, 81; 1869, 56, 57; Winding-up Act (1906), s. 69.

#### ANALYSIS OF NOTES.

Claims not provable in bankruptcy are of two classes— .

First class.

Second class.

Valuation of contingent claims and claims for unliquidated damages.

Effect of valuation.

Contingent claims—

Separation annuity.

Alimony.

Section 44(2)—

Liabilities.

Double proof against one estate.

Right of surety on payment to stand in place of principal creditor.

Rule of construction as to liability of surety for whole debt or for part.

Proof against different estates for same debt.

Bill holder may only prove for residue of debt in certain cases.

Proof against estate of surety.

Mutual accounts of dishonoured bills.

Bill security for larger sum than debt.

Guarantee of payment of interest.

Costs.

A penalty.

Debts founded on voluntary deeds.

Debts and liabilities accruing subsequently to receiving order.

Proof by *cestuis que trust*.

Interest.

No right of proof between mortgagee and assignee of equity of redemption.

Statute of limitations.

Partnership debt incurred by fraud.

Section 44 differs in two respects from section 30 of the present English Act. In England a person having



**Section 44** notice of any act of bankruptcy available against the debtor may not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice<sup>7</sup>. The second point of difference is that under the English Act, if the court is of the opinion that the value of a debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt is deemed to be a debt not provable in bankruptcy. Under *The Bankruptcy Act* there is no such latitude. The result will be that when the debtor obtains his discharge he will, subject to section 61, be freed from all contingent claims and demands in the nature of unliquidated damages, except those arising otherwise than by reason of a contract promise or breach of trust.

Claims not provable in bankruptcy are of two classes.  
First class.

Certain kinds of claims are not provable in bankruptcy. These fall into two classes: those which may not be proved by reason of the general policy of the law; and those which *The Bankruptcy Act* has excluded from proof<sup>8</sup>. With respect to the first class it is clear that a debt founded on an illegal consideration cannot be proved in bankruptcy<sup>9</sup>. Thus money paid for the purpose of perfecting a fraud on the creditors cannot be the subject of proof against the debtor's estate<sup>10</sup>; and where a creditor executes a composition deed and secretly stipulates for a preference he may not prove, even for his original debt which by the terms of the deed he has released<sup>1</sup>. Although a claim for the recovery of money won by betting cannot be proved in England in bankruptcy by reason of 8 & 9 Vic. c. 109, s. 18, declaring wagers on horse racing to be void, yet where a new contract arises out of this transaction

<sup>7</sup> Section 30 (2).

<sup>8</sup> See also the rules limiting proof in partnership cases which are treated in the notes to section 53. Restricted creditors may prove; as may secured creditors if they comply with the Act. See notes to sections 48 and 46.

<sup>9</sup> *Ex parte Schmalzing in re Adelbert* (1817), Buck. 93, where the demand arose out of an attempt to carry on trade with an enemy's country in war time.

<sup>10</sup> *In re and ex parte Myers* (1908), 1 K. B. 941; 77 L. J. K. B. 386; 15 Mans. 85.

<sup>1</sup> *Ex parte Oliver in re Hodgson* (1850), 4 DeG. & S. 354; *In re Cross* (1848), 4 DeG. & S. 364n; *Ex parte Phillips* (1888), 36 W. R. 567.



and the new contract is not tainted with illegality, but is for good consideration, the claim may it seems be proved<sup>2</sup>. Even if a person who has been injured by a felony is not allowed by the policy of the law to prove in the bankruptcy of the felon if he has failed in his duty of bringing or endeavouring to bring the felon to justice, the obligation to prosecute does not extend to his trustee in bankruptcy who, it has been said, in this case represents creditors<sup>3</sup>. Section 44

The second class of claim is that which *The Bankruptcy Act* has excluded from proof, namely demands in the nature of unliquidated damages arising otherwise than by reason of a contract promise or breach of trust<sup>4</sup>. Where the claim is in tort, there can be no proof unless the damages become liquidated before the date of the receiving order. They become liquidated by judgment, award<sup>5</sup> or compromise<sup>6</sup>, but not by verdict only<sup>7</sup>. But the liability of a trustee for breach of trust is considered in bankruptcy as a liability arising from a contract and not from what has been called a pure tort<sup>8</sup>, or as an equitable debt or liability in the nature of a debt<sup>9</sup>. Similarly a claim for unliquidated Second class.

<sup>2</sup> *Pyams v. Stuart King* (1908), 2 K. B. 696; 77 L. J. K. B. 794; *Bubb v. Yelverton*, L. R. 9 Eq. 471; 39 L. J. Ch. 428.

<sup>3</sup> *Per* Bramwell and James, L.J., in *Ex parte Ball in re Shepherd* (1879), 10 Ch. D. 667; 48 L. J. Bank. 57. The judgment of Baggallay, L.J. was to the effect that the trustee is in no better position than the bankrupt. See Chapter VI., *ante*.

<sup>4</sup> Section 44(1). Under *The Insolvent Act* of 1864 claims for unliquidated damages arising out of breach of contract were not provable: *Burrowes v. De Blaquiére* (1874), 34 U. C. Q. B. 498.

<sup>5</sup> See *Ex parte Harding in re Pickering* (1854), 23 L. J. Bank. 22; 5 D. M. & G. 367.

<sup>6</sup> *Ex parte Mumford* (1808), 15 Ves. 289.

<sup>7</sup> *Ex parte Stone in re Giles* (1889), 61 L. T. 82; 37 W. R. 261; 6 Mor. 158; *In re Newman ex parte Brooke* (1876), 3 Ch. D. 494; 46 L. J. Bank. 57, but the successful defendant's costs of an action founded on contract though not taxed until after adjudication are within the scope of section 44(2) and are provable; *Ex parte Peacock* (1872), L. R. 8 Ch. 682; 42 L. J. Bank. 78; as explained in *In re Newman ex parte Brooke*, *supra*.

<sup>8</sup> *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122, 130; 50 L. J. Ch. 449, and see notes to section 47.

<sup>9</sup> *Per* James, L.J., in *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. Bank. 103. In that case Bramwell, L.J., put it, "Because I suppose trustees are held to undertake, simply and severally for the performance of their duties," and see *In re Parker ex parte Sheppard* (1887), 19 Q. B. D. 84, 87.



Section 44 damages for a fraudulent representation on the sale of a chattel is considered to be based on an obligation arising out of the contract of sale, and not out of a personal tort<sup>10</sup>.

Therefore if a man is guilty of a fraudulent contract or breach of trust, and by that means gets into his own pocket the money of the person who has been defrauded, that person may prove for the amount which has thus come into the hands of the fraudulent party<sup>1</sup>, but where there is no contract between the parties, or where the benefit of the fraud has not gone into the pocket of the bankrupt, the claim is not provable unless judgment was obtained before the date of the receiving order<sup>2</sup>. But there may be proof against the estate of a fraudulent promoter for secret profits received on the promotion of a company where the promoters have concealed their identity under the name of a corporation formed by them, the corporation being only an "alias" for them, and the provisions of the Companies Act not having been complied with<sup>3</sup>. Where a patentee is entitled to recover the amount of profits made by an infringement of his patent his claim is a provable demand, for the amount of the profits is recoverable as money had and received to his use and not in the nature of damages<sup>4</sup>, but a cause of action for damages for false representation is not a provable demand<sup>5</sup>.

Section 44(3), provides for the valuation in the manner prescribed by general Rules<sup>6</sup> of all contingent

<sup>10</sup> *Jack v. Kipping* (1882), 9 Q. B. D. 113; 51 L. J. Q. B. 463; and see *Tilley v. Bowman, Ltd.* (1910), 1 K. B. 745; 79 L. J. K. B. 547; 17 Mans. 97.

<sup>1</sup> *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. Bank. 103; *Jack v. Kipping* (1882), 9 Q. B. D. 113; 51 L. J. Q. B. 463.

<sup>2</sup> *In re Giles ex parte Stone* (1889), 6 Mor. 158, a case of a director being sued for misrepresentations in a prospectus, and see notes to section 47.

<sup>3</sup> *In re Darby ex parte Brougham* (1911), 1 K. B. 95; 80 L. J. K. B. 180; 18 Mans. 10.

<sup>4</sup> *Watson v. Holliday* (1882), 20 Ch. D. 780; 52 L. J. Ch. 543.

<sup>5</sup> *Ex parte Baum in re Edwards* (1874), 1 L. R. 9 Ch. 673; 44 L. J. Bank. 25.

<sup>6</sup> See Rule 119.



claims<sup>7</sup>, and all such claims for unliquidated damages as are authorized by the section. This is one of the important provisions of the Act. As a bankrupt's discharge only frees him from debts provable in his bankruptcy, and as the older bankruptcy Statutes contained no provision for the valuation of claims for unliquidated damages or of contingent claims the bankrupt obtained a very imperfect discharge<sup>8</sup>. The object of present day bankruptcy legislation, is that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements and contingencies of every kind<sup>9</sup>.

**Section 44**  
Valuation of  
contingent  
claims and  
claims for  
unliquidated  
damages.

The English Act, as has been indicated above, permits the court to declare that the value of a debt or liability is incapable of being fairly estimated, but this provision, it would seem, will be only sparingly resorted to<sup>10</sup>; and *The Bankruptcy Act* has no such provision.

It is only after valuation that contingent claims and claims for unliquidated damages are deemed to be proved debts to the amount of their valuation. A creditor may not vote until his debt is proved<sup>1</sup>, and dividends are only to be distributed to those who have proved<sup>2</sup>.

Effect of  
valuation.

<sup>7</sup> The English Act says definitely that contingent claims are provable. The words "certain or contingent" have been omitted from section 44(2) of *The Bankruptcy Act*. But section 44(3) appears to indicate that contingent claims are provable.

<sup>8</sup> Prior to the Act 6 Geo. IV. c. 16, contingent claims could not be proved. Nearly eighty years before that time Lord Hardwicke expressed a wish (1 Atk. 120) in which Lord Eldon afterwards concurred (9 Ves. 112) "that some gentleman might think of a clause which might remedy and settle the matter for the future." From that time until 1869 the Legislature in England was engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, and to make it provable in bankruptcy against his estate so that the bankrupt might be relieved for the future from any liability in respect thereof: *per* Halsbury, L.C., in *Hardy v. Fothergill* (1888), 13 A. C. 351, at 356; 58 L. J. Q. B. 44.

<sup>9</sup> *Ex parte Lynvi Coal and Iron Co. in re Hide* (1871) L. R. 7 Ch. 28, *per* James, L.J., at page 32; 41 L. J. Bank. 5.

<sup>10</sup> "The provision for the possibility of the court thinking that the value of the debt or liability was incapable of being fairly estimated must have been inserted *ex majori cautela*—and it is to be observed that the section only speaks of an estimate being made of the value not of a valuation," *per* Bramwell, L.J., in *Ex parte Neal in re Batey* (1880), 14 Ch. D. 579, at 584.

<sup>1</sup> Section 42(9).

<sup>2</sup> See section 37(1).



## Section 44

Contingent  
claims.  
Separation  
annuity.

Alimony.

However difficult it may be to measure the liability incurred by a husband under a separation deed which provides an annuity for the wife (the annuity ceasing when co-habitation is resumed), still that is a liability provable in bankruptcy<sup>3</sup>, but future weekly or monthly payments of alimony payable by virtue of an order of the Divorce Court are not so provable<sup>4</sup>. It has also been held<sup>5</sup> that although arrears of alimony payable under such an order constitute a debt enforceable under section 5 of *The Debtors Act* 1869<sup>6</sup>, there can be no proof either for arrears payable at the date of the receiving order or for arrears which have-become due since the receiving order<sup>7</sup>. While damages which have been awarded to a petitioner in the Divorce Court, and have been ordered to be paid into court, will not support a bankruptcy petition against the co-respondent<sup>8</sup>, they are a debt provable in bankruptcy<sup>9</sup>. A surety has a right of proof in respect of his contingent liability as surety<sup>10</sup>. The contingent liability of an acceptor of a bill of exchange, which has been dishonoured, to damages to the foreign drawer in the nature of re-exchange is a debt provable in bankruptcy<sup>1</sup>,

<sup>3</sup> *Victor v. Victor* (1912), 1 K. B. 247; 81 L. J. K. B. 354; 19 Mans. 53; *Ex parte Bates in re Pannell* (1879), 11 Ch. 914; 48 L. J. Bank. 113; *Ex parte Neal in re Batey* (1880), 14 Ch. D. 579.

<sup>4</sup> *Linton v. Linton* (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; 2 Mor. 179.

<sup>5</sup> *Per* Hawkins, and Vaughan Williams, J J., Wright, J., diss.

<sup>6</sup> *Linton v. Linton* (1885), 15 Q. B. D. 239; 34 L. J. Q. B. 529; 2 Mor. 179.

<sup>7</sup> *Kerr v. Kerr* (1897), 2 Q. B. 439; 66 L. J. Q. B. 838; 4 Mans. 267; see *In re Stillwell, Broderick v. Stillwell* (1916), 1 Ch. 365.

<sup>8</sup> *In re and ex parte Muirhead* (1876), 2 Ch. D. 22; 45 L. J. Bank. 65.

<sup>9</sup> *In re Giles ex parte Stone* (1889), 6 Mor. 158.

<sup>10</sup> *In re Paine ex parte Read* (1897), 1 Q. B. 122; 66 L. J. Q. B. 71; 3 Mans. 309; *In re Blackpool Motor Car Co., Ltd.* (1901), 1 Ch. 77; 70 L. J. Ch. 61; 8 Mans. 193; *In re Harepath and Delmar* (1890), 7 Mor. 129; *Wolmershausen v. Gullich* (1893), 2 Ch. 514; *In re Stratford Fuel, Ice and Construction Co., Coughlin and Irwin's Claim* (1913), 28 O. L. R. 481; 13 D. L. R. 64, affd.; 50 S. C. R. 100; 28 D. L. R. 437, and see as to a possible liability at the end of a lease on a covenant to indemnify: *Hardy v. Pothergill* (1888), 13 A. C. 351; 58 L. J. Q. B. 44; a liability or obligation for the payment of money out of the estate of the debtor after his death: *Barnett v. King* (1891), 1 Ch. 4; 60 L. J. Ch. 148; 7 Mor. 267; a liability under a covenant in a marriage settlement to transfer after-acquired property to trustees: *In re Reis ex parte Clough* (1904), 2 K. B. 769; 73 L. J. K. B. 929; 11 Mans. 229.

<sup>1</sup> *In re Gillespie ex parte Roberts* (1886), 18 Q. B. D. 286; 56 L. J. Q. B. 74.



as is a shareholder's liability in respect of future calls in a company<sup>2</sup>. If the company fails to prove in the bankruptcy and the shareholder obtains his discharge he cannot afterwards be placed on the list of contributors<sup>3</sup>. Section 44

The provisions of section 44(2) are very wide. The word liabilities is not defined in the Act, but the corresponding English section<sup>4</sup> contains the following definition. Sec. 44(2).  
Liabilities.

30(8) "Liability" shall for the purposes of this Act include—

(a) any compensation for work or labour done;

(b) any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor;

(c) generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion.

Section 50 deals with proof of debts payable at a future time.

Wide though the provisions of the subsection are they are subject to certain rules which have been developed in the Bankruptcy Court. Among the most important of these are the rule against double proof and the rules with respect to proofs by holders of bills of exchange and sureties.

The principle of what has been called the rule against double proof is that an insolvent estate ought not to pay two dividends in respect of the same debt<sup>5</sup>. Double proof  
against one  
estate.

<sup>2</sup> *In re Mercantile Mutual Marine Association* (1883), 25 Ch. D. 415; 53 L. J. Ch. 593.

<sup>3</sup> *In re Mercantile Mutual Marine Association*, *supra*, and see as to question of disclaimer of the stock by the trustee: *In re Hallett ex parte National Insurance Co.* (1894), 1 Mans 380; *Denison v. Smith* (1878), 43 U. C. Q. B. 503. Where such proof has been made and a dividend paid to a company which goes into voluntary liquidation and there is a surplus of assets in the liquidation the bankrupt's shares are not to be treated as fully paid up shares for the purpose of the distribution of the surplus assets: *Re West Coast Gold Fields, Ltd.* (1906), 1 Ch. 1; 75 L. J. Ch. 23; 12 Mans. 414.

<sup>4</sup> Section 30.

<sup>5</sup> *In re Oriental Commercial Bank ex parte The European Bank* (1871), L. R. 7 Ch. 99; 41 L. J. Ch. 217.



**Section 44** Therefore there must not be double proof<sup>6</sup>, that is to say double ranking or effective proof so as to compel payment of two dividends in respect of the same debt<sup>7</sup>, and in considering whether two proofs are with respect to the same debt regard must be had not to technicalities, but to the substance<sup>8</sup>. Thus if an acceptor accepts bills for the accommodation of the drawer and the drawer enters into a contract express or implied that he will provide for the bills when they become due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate, namely one proof by the holder of the bill and the other proof by the acceptor of the bill on the contract of indemnity<sup>9</sup>. If it were not so a creditor could always manage by getting his debtor to enter into several distinct contracts with different persons for the same debt to obtain higher dividends than other creditors, and perhaps get his debt paid in full<sup>10</sup>. Consequently where a debtor had charged to mortgagees certain property, and conveyed the equity of redemption of the property to his wife, covenanting with her to discharge the mortgage debt, and the mortgagees were admitted to rank for dividend against the estate, the wife was not allowed to prove<sup>1</sup>. But a compromise by secured creditors with a liquidator of a company whereby the securities in the hands of the creditors are declared valid the creditors reserving their rights against the sureties and undertaking not to rank on the estate will not prevent sureties, who are called upon by the creditors to pay, from ranking on the estate<sup>2</sup>.

<sup>6</sup> *In re Melton, Milk v. Towers* (1918), 1 Ch. 37.

<sup>7</sup> *In re Stratford Fuel, Ice and Construction Co., Coughlin and Irwin's Claim* (1913), 28 O. L. R. 481; 13 D. L. R. 64; affd. 50 S. C. R. 100; 28 D. L. R. 437. And proof by a surety who has been compelled to pay the full debt is not such objectionable double proof: *Re Stratford Fuel, Ice and Construction Co.*, *supra*.

<sup>8</sup> *In re Melton, Milk v. Towers*, *supra*, at p. 60.

<sup>9</sup> *In re Oriental Commercial Bank ex parte The European Bank*, *supra*.

<sup>10</sup> *In re Oriental Commercial Bank ex parte The European Bank*, *supra*.

<sup>1</sup> *In re and ex parte Hoey* (1919), 88 L. J. K. B. 273, and see *In re Oriental Commercial Bank ex parte European Bank* (1871), L. R. 7 Ch. 99; 41 L. J. Ch. 217; *Deering v. Bank of Ireland* (1886), 12 A. C. 20; 56 L. J. P. C. 47; *In re Moss ex parte Hallett* (1905), 2 K. B. 307; 74 L. J. K. B. 764; 12 Mans. 227.

<sup>2</sup> *In re Stratford Fuel, Ice and Construction Co.*, *supra*.



Where a surety for a debtor who has become bankrupt pays the whole of the debt for which he is liable as between himself and the principal creditor, the right of proof which the principal creditor would have had becomes *pro tanto* the right of proof by the surety<sup>3</sup>; and if the principal creditor has received a dividend with respect to that right of proof, he becomes trustee for the surety for the amount of the dividend which he has so received<sup>4</sup>. Similarly where a surety who is liable for the part of a debt has paid the whole of what he is liable for, he is entitled to stand in the place of the creditor to that extent against the estate of the bankrupt debtor<sup>5</sup>, but the surety may in his contract of suretyship agree to waive this right for the benefit of the creditor; and where he waives that right the fact that he has been secured by a security on the estate of the creditor is, in the absence of fraud, immaterial<sup>6</sup>.

Section 44  
Right of surety on payment to stand in place of principal creditor.

But as the surety is not entitled to stand in the place of the creditor until he has paid the whole of what

<sup>3</sup> If, then, two other sureties pay off the whole debt they are entitled to all the remedies which the creditor would have had and can prove for the whole debt against their co-surety's estate, but can only recover so much as will recoup themselves what they have paid beyond their proper share: *In re Parker, Morgan v. Hill* (1894), 3 Ch. 400, at p. 407; 64 L. J. Ch. 6; but where a surety has not paid more than his proportion of the debt due the principal creditor there is no good petitioning creditor's debt and presumably no debt provable in bankruptcy against the estate of a co-surety by his fellow surety, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor: *In re and ex parte Snowden* (1881), 17 Ch. D. 44; 50 L. J. Ch. 540.

<sup>4</sup> *In re Sass and ex parte National Prov. Bank, England, Ltd.* (1896), 2 Q. B. 12; 65 L. J. Q. B. 481; 3 Mans. 125; *In re Stratford Fuel, Ice and Construction Co., Coughlin & Irwin's Claim* (1913), 28 O. L. R. 481; 13 D. L. R. 64; affd. 50 S. C. R. 100; 28 D. L. R. 437; *per* Hodgins, J., in 28 O. L. R. at p. 490; *Ellis v Emmanuel* (1876), 1 Ex. D. 157; 46 L. J. Ex. 25. Where there is a bond for the ultimate balance due and the creditor makes a compromise with the liquidator of the debtor whereby he agrees not to rank on the estate for the unsecured portion of his claim, but reserves his rights against the surety, the surety on payment of the balance of the claim is entitled to occupy the position of a creditor; *In re Stratford Fuel, Ice and Construction Co., supra*.

<sup>5</sup> *Thornton v. McKewan*, 1 H. & M. 525, as cited in *Midland Banking Co. v. Chambers* (1869), L. R. 4 Ch. 398; 38 L. J. Ch. 478.

<sup>6</sup> *Midland Banking Co. v. Chambers, supra*. The principal debtor who has received payment from the surety of the part of the debt guaranteed by him can in such case prove for his whole debt; though he cannot receive more than 100 cents on the dollar, S. C.



**Section 44**

Rule of construction as to liability of surety for whole debt or for part.

he is liable for, the point which most frequently arises in bankruptcy in this connection is whether the surety is surety for the whole of the debt or only for a part. The guarantee given by the surety may be so worded as expressly to limit his liability in amount, and yet his suretyship may still be in respect of the whole debt. In such a case, although the surety has paid the whole of the sum represented by his limited liability, he has no right of proof in preference or in priority to the principal creditor, for he has only paid a part of the principal debt<sup>7</sup>, and, conversely, in such case the principal creditor, although he has received payment from the surety of the part of his debt represented by the limited liability of the surety, is entitled to prove in the bankruptcy for the full amount due from the principal debtor<sup>8</sup>. The rule of construction in such cases as given in *Ellis v. Emmanuel*<sup>9</sup> is that where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (*prima facie* at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not *prima facie* to be construed as a security for part of the debt only<sup>10</sup>.

Proof against different estates for same debt.

Where a person has a demand upon a bill or bond against several persons and no part of the demand has been paid before bankruptcy by any of them he may prove against each; and the circumstance that one is a surety, the other a principal, or a co-surety, as between themselves does not give a right to stop the

<sup>7</sup> *In re Sass ex parte National Prov. Bank England, Ltd.* (1896), 2 Q. B. 12; 65 L. J. Q. B. 481; 3 Mans. 125; *Martin v. McMullen* (1891), 18 O. A. R. 559; *Ex parte National Prov. Bank v. Rees* (1881), 17 Ch. D. 98; *In re Patent Cloth-Board Co., ex parte Bank of Ottawa* (1903), 3 O. W. R. 373, and see *Struthers v. Henry* (1900), 32 O. R. 365.

<sup>8</sup> *In re Sass ex parte National Prov. Bank, supra*; *Ex parte National Prov. Bank v. Rees, supra*; *In re Melton, Milk v. Towers* (1918), 1 Ch. 37.

<sup>9</sup> (1876), 1 Ex. D. 157.

<sup>10</sup> S. C. at pp. 168-9; and see *Ex parte Rushforth* (1805), 10 Ves. 409.



holder receiving dividends until he has received 20 shillings in the pound<sup>1</sup>. Section 44

If at the time of proving against the estate of a bankrupt liable on a bill of exchange or note, the creditor so proving has received part of the debt from another person to whom liability also attaches, he will be allowed to prove for the residue only<sup>2</sup>. This rule is said to be applicable to negotiable instruments only<sup>3</sup>, and not to a case where there is no privity of contract between the person in the position of principal debtor and the person in the position of surety. Thus where a lessor proved for £400 against the estate of the lessee under a covenant in the lease by which the lessee was to reinstate the premises if they were destroyed; and the lessor had received £273 from an insurance company in full discharge of his right under a policy of insurance on the premises, it was held that he was entitled to prove for £400; the right of the insurance company to any dividend paid being another matter<sup>4</sup>.

Bill holder may only prove for residue of debt in certain cases.

<sup>1</sup> *Per Eldon, L.C.*, in *Ex parte Rushforth* (1805), 10 Ves. 409, 416; cited *In re Parker, Morgan v. Hill* (1894), 3 Ch. 400; 64 L. J. Ch. 6, *per Davey, L.J.*, at 407. Thus if bills are discounted in the market which are drawn by one firm on another firm and then both firms become bankrupt or agree to a composition the bill-holder is entitled to prove against both estates and to receive all the dividends or composition he can get from both estates until he receives 20 shillings in the pound and the firm which is surety on the bills has no right to receive anything until the bill-holder has received 20 shillings in the pound: *Ex parte Turquand in re Fothergill* (1876), 3 Ch. D. 445; 45 L. J. Bank. 153. Where the bill-holder has received debentures in the way of dividends from the principal debtor which are worth 5 shillings in the pound the surety who has paid 18 shillings in the pound can say to the bill-holder: "Your right is only to get 20 shillings in the pound. These debentures are now saleable at 5 shillings in the pound in the market; go and sell them and take 2 shillings to make 20 shillings and give me 3 shillings," see *per Mellish, L.J.*, in *Ex parte Turquand in re Fothergill, supra*, at 451.

<sup>2</sup> *Ex parte Taylor in re Houghton* (1857), 26 L. J. Bank. 58.

<sup>3</sup> *In re Blackburn ex parte Strouts* (1892), 9 Mor. 249, but see *infra*. *In re Blakely ex parte Aachener Disconto Gesellschaft* (1892), 9 Mor. 173, and distinguish *In re Sass ex parte National Prov. Bank of England Ltd.* (1896), 2 Q. B. 12; 65 L. J. Q. B. 481; 3 Mans. 125; *Ex parte National Prov. Bank v. Rees* (1881), 17 Ch. D. 98. If the creditor is paid in full by the surety that does not prevent the creditor suing the debtor for the whole debt because although he has received 20s. in the pound he has not received it from the debtor: *Per Scrutton, L.J.*, in *In re Melton, Milk v. Towers* (1918), 1 Ch. 37.

<sup>4</sup> *In re Blackburn ex parte Strouts* (1892), *supra*.



## Section 44

Proof  
against  
estate of  
surety.

A creditor is entitled to prove against the estate of a surety for the full amount of the debt for which the surety is liable unless he, the creditor, has received part of his debt by payment from the estate of the principal debtor; or unless a dividend from the estate of the principal debtor has been declared, in which case he may only prove for the residue after deducting the amount so paid<sup>5</sup>. But if after proof is made the creditor receives a dividend from the estate of the principal debtor that will not be deducted from the amount of his proof<sup>6</sup>. A substitution by certain guarantors of security in place of their personal responsibility which security was to be carried in a suspense account, does not until appropriation operate as a payment so as to prevent the principal creditor from proving for the full debt against the estate of another guarantor<sup>7</sup>. A surety is entitled to have the liability proved as against him in the same way as against the principal debtor; and in the absence of agreement a judgment against a principal debtor is not binding on the surety and is not evidence against him in an action by the creditor<sup>8</sup>.

Mutual ac-  
counts of dis-  
honoured  
bills.

Where there are mutual accommodation acceptances between two firms or individuals who have both become bankrupt and the account between them consists partly of dishonoured bills, proof cannot be made against either estate in respect of the dishonoured bills<sup>9</sup>. This principle does not apply when the bills are in the hands of third parties who seek to prove<sup>10</sup>.

Bill security  
for larger  
sum than  
debt.

The holder of a bill of exchange taken from the drawer as security for a sum less than the amount of the bill is entitled as against the estate of the bankrupt, who had accepted it for the accommodation of the

<sup>5</sup> *In re Blakely ex parte Aachener Disconto Gesellschaft* (1892), 9 Mor. 173.

<sup>6</sup> S. C.

<sup>7</sup> *Commercial Bank of Australia v. Official Assignee* (1893), A. C. 181; 62 L. J. P. C. 61.

<sup>8</sup> *Ex parte Young in re Kitchen*, 17 Ch. D. 668.

<sup>9</sup> *Ex parte Walker* (1798), 4 Ves. 373.

<sup>10</sup> *Ex parte Cama in re London, Bombay and Mediterranean Bank* (1874), L. R. 9 Ch. 686; 43 L. J. Bank. 683; and distinguish *Ex parte Macredie in re Charles* (1873), L. R. 8 Ch. 535; 42 L. J. Bank. 90.



drawer, to prove for the full amount of the bill, though he cannot receive dividends in excess of the debt due to him by the drawer<sup>1</sup>. Section 44

A surety is not it seems discharged from a guarantee of "the interest payable in respect of the debenture until the repayment" of the principal sum, when, by reason of the dissolution of the company which issued it, the debenture is no longer payable by the company. The creditor is therefore entitled to prove for the estimated value of his security<sup>2</sup>, but where the guarantee is as to the payment of interest on a mortgage so long "as any principal money remains due," the obligation of the surety is discharged by the bankruptcy of the debtor; for the principal money can only remain due in a legal sense when it can be recovered in an action, which cannot be done after the bankruptcy of the debtor<sup>3</sup>. Guarantee of payment of interest.

The decisions with respect to proof for costs are important. First with respect to actions against persons who become bankrupt, it has been decided that if an action is brought for the recovery of a sum of money against a person who becomes bankrupt before verdict and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable but not otherwise<sup>4</sup>. Bankruptcy does not operate as a revocation of a submission to arbitration and although the trustee is not Costs.

<sup>1</sup> *Ex parte Newton in re Bunyard* (1880), 16 Ch. D. 330. Where a purchaser of bills must be taken to have notice that they are fraudulent he cannot prove for the full amount of the bills, but only for the sum paid by him for the bills: *In re Gommersall* (1875), 1 Ch. D. 137, 142; 45 L. J. Bank. 1; *affd. sub nom. Jones v. Gordon* (1877), 2 A. C. 616.

<sup>2</sup> *In re Fitzgeorge ex parte Robson* (1905), 1 K. B. 462; 74 L. J. K. B. 322; 12 Mans. 14.

<sup>3</sup> *In re Moss ex parte Hallett* (1905), 2 K. B. 307; 74 L. J. K. B. 764.

<sup>4</sup> *In re British Goldfields of West Africa* (1899), 2 Ch. 7; 68 L. J. Ch. 412; 6 Mans. 334, citing *In re Newman* (1876). 3 Ch. D. 494; 46 L. J. Bank. 57; *In re Bluck*, 57 L. T. 419; 4 Mor. 273; *Emma Silver Mining Co.* (1880), 17 Ch. D. 122; 50 L. J. Ch. 449. A creditor who had obtained judgment but whose costs were untaxed might under the Act of 1869 ascertain how much was likely to be taxed off his bill so that he could safely swear that a fixed certain sum was due him; *Ex parte Ruffle in re Dummelow* (1873), L. R. 8 Ch. 997; 42 L. J. Bank. 82; but see *Ex parte Pearce in re Grieves* (1879), 13 Ch. D. 262.



**Section 44** bound by the reference he has no power to revoke the submission. A creditor under such a submission to arbitration where the costs were to be in the discretion of the arbitrator is entitled even though the award is given after the date of the adjudication to prove for the costs in question<sup>6</sup>. Secondly with respect to actions by a debtor. If an unsuccessful action is brought by a man who becomes bankrupt, and he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt they are provable<sup>7</sup>. But if no verdict is given against him, and no order is made for payment of costs until after he becomes bankrupt they are not provable; for in such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy<sup>8</sup>.

A penalty.

Where a contract provides that in case of breach a named sum should be paid over as and for liquidated damages, but the sum is in fact in the nature of a penalty, the creditor is entitled to prove only for the actual damage he has sustained<sup>9</sup>.

Debts founded on voluntary deeds.

It formerly was the rule in bankruptcy that creditors whose debts were founded on voluntary deeds were to be postponed in the receipt of dividends until all the creditors in value had been paid in full. That is no longer the law<sup>10</sup>.

The class of claims covered by the words "or to which he may become subject before his discharge by

<sup>6</sup> *In re Smith ex parte Edwards* (1886), 3 Mor. 179. The trustee has two courses open: He may either allow the reference to go on and let the creditor prove, or he may apply to the court and express his willingness to allow the creditor to prove as for damages for the reference coming to an end (S.C.).

<sup>7</sup> *In re British Goldfields of West Africa*, *supra*, citing *In re Peacock* (1872), L. R. 8 Ch. 682; 42 L. J. Bank. 78.

<sup>8</sup> *In re British Goldfields of West Africa* (1899), 2 Ch. 7; 68 L. J. Ch. 412; 6 Mans. 334, citing *Vint v. Hudspeth* (1885), 30 Ch. D. 24; 54 L. J. Ch. 844, and see *In re a Debtor* (1911), 2 K. B. 652; 80 L. J. K. B. 1224; 18 Mans. 311.

<sup>9</sup> *Ex parte Copper in re Newman* (1876), 4 Ch. D. 724; 46 L. J. Bank 57; and see *Ex parte Maclean* (1842), 2 M. D. & D. 564.

<sup>10</sup> *Re Coates ex parte Scott* (1892), 8 Ch. D. 621; 47 L. J. Bank. 43; 9 Mor. 87; *Ex parte Pottinger in re Stewart* (1878), 8 Ch. D. 621; 47 L. J. Bank. 43.



reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment," include cases of contract where the trustee either disclaims or ceases to perform the contract. In such case the creditor may prove against the estate for the damages occasioned by the breach of the contract, and this is his only remedy<sup>1</sup>. The measure of the damages in the case of leasehold is the difference between the rent under the lease and what rent can be obtained after the disclaimer<sup>2</sup>.

**Section 44**  
Debts and liabilities accruing subsequently to receiving order.

*Semble*, *cestuis que trust* may prove personally in the bankruptcy of their trustees<sup>3</sup>.

Proof by *cestuis que trust*.

The rules with respect to proof for interest are treated in the notes to sections 49 and 50.

Interest.

The transferee of a mortgage has no right of proof against the estate of an assignee of the equity of redemption, there being no privity of contract between them, and no personal liability on the part of the assignee of the equity of redemption to pay interest; nor will the fact that the assignee has paid interest on the mortgage confer a right of proof<sup>4</sup>.

No right of proof between mortgagee and assignee of equity of redemption.

Just as a debt barred by the Statute of Limitations is not a good petitioning creditor's debt<sup>5</sup>, so barred debts are not provable<sup>6</sup>. When once the right of proof exists against the estate<sup>7</sup> the Statute of Limitations

Statute of Limitations.

<sup>1</sup> *In re Sneezum ex parte Davis* (1876), 3 Ch. D. 463, 475; 45 L. J. Bank. 137.

<sup>2</sup> *Ex parte Llynvi Coal and Iron Co. in re Hide* (1871), L. R. 7 Ch. 28; 41 L. J. Bank. 5.

<sup>3</sup> *In re Bradely ex parte Walton* (1910), 54 S. J. 377; varied *sub nom. in re Bradely ex parte Bournier*, S. C. p. 444.

<sup>4</sup> *In re Errington ex parte Mason* (1891), 1 Q. B. 11.

<sup>5</sup> *Bryant v. Withers*, 2 M. & S. 123; *Ex parte Griffiths*, 3 D. M. & G. 174; *Ambrose v. Clenton*, 2 Str. 1052.

<sup>6</sup> *Ex parte Kidd*, 7 Jur. N. S. 613; *Ex parte Dewdney* (1808), 15 Ves. 479; *Ex parte Roffey*, 2 Rose 245. The rule is the same in compulsory winding-up proceedings: *In re General Rolling Stock Co.* L. R. 7 Ch. 646, 648, 649. See, however, in the case of a voluntary liquidation: *In re Fleetwood and District Electric Light and Power Syndicate* (1915), 1 Ch. 486.

<sup>7</sup> The rule is probably the same both under a receiving order and under an authorized assignment: Compare *Court v. Walsh* (1883), 9 O. A. R. 294, 309. See, further, as to the practice in England under assignments and compositions: *Per Bramwell, B.*, in *Slater v. Jones*, L. R. 8 Ex. 193, 194; *Ex parte Topping in re Levey*, 34 L. J. Bank. 44; *Good v. Cheeseman*, 5 B. & Ad. 328; *Oughton v. Trotter*, 2 Nev. & Man 71; *Cranley v. Hillary*, 2 M. & S. 120; *Phillips v. Phillips*, 3 Hare 281.



**Section 44** does not run in favour of the trustee of the estate<sup>8</sup>, and the creditors can subject to the provisions of section 37(3) prove and participate in dividends at any time<sup>9</sup>. While therefore a debt does not become barred by lapse of time in the bankruptcy if it was not so barred at the beginning of the bankruptcy, still if the debt or cause of action arose before and not after the commencement of the bankruptcy, the statute will continue to run so as to bar the debt from ranking against assets which are not assets in the bankruptcy<sup>10</sup>.

A payment to take a debt out of the Statute of Limitations must be a payment from which a promise to pay the balance can be inferred. Such a promise will not after the death of the debtor, be inferred from payments which have been made under a composition or deed of arrangement which contains no promise to pay more than will come from the income of the debtor during his lifetime<sup>11</sup>.

As there is nothing in the Act to deprive a mortgagee of his right of entry on land mortgaged to him by the debtor, or of his right of action to enforce it against the trustee if he assumes possession, it follows that an authorized assignment, and it is considered a receiving order, will not stop the running of the statute against the claim of the mortgagee to the land<sup>1</sup>. Where a creditor has a lien he may make use of it to enforce payment of his debt, although his debt is statute barred<sup>2</sup>.

Partnership  
debt incurred  
by fraud.

Where a partnership debt has been incurred by a fraud of the partners, the defrauded creditor may prove at his election against either the joint estate of the firm or the separate estates of the partners,<sup>1</sup> and the creditor does not lose his right of election merely

<sup>8</sup> See *In re Coles ex parte Ross* (1827), 2 Gly. & J. 330; *In re Crossley, Munns v. Burn* (1887), 35 Ch. D. 266.

<sup>9</sup> *In re Cullwick ex parte O. R.* (1918), 1 K. B. 646; 87 L. J. K. B. 827; (1918-19), B. & C. R. 33.

<sup>10</sup> *In re Benzon, Bower v. Chetwynd* (1914), 2 Ch. 68; 83 L. J. Ch. 658; 21 Mans. 8.

<sup>11</sup> *In re Lee ex parte Grunwald* (1920), 2 K. B. 200; 89 L. J. K. B. 364; (1918-19), B. & C. R. 287.

<sup>1</sup> *Court v. Walsh* (1883), 9 O. A. R. 294, 309.

<sup>2</sup> *In re Hepburn ex parte Smith* (1884), 14 Q. B. D. 394, 400; 54 L. J. Q. B. 422; *Carter v. Carter* (1886), 55 L. J. Ch. 230.

<sup>3</sup> *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. Bank. 103.



because he has proved and received a dividend; for he Section 45  
 may change his election on refunding the dividend  
 with interest<sup>2</sup>.

### *Proof of Debts.*

45. (1) Every creditor shall prove his debt as Proof of debts.  
 soon as may be after the making of a receiving order or after the date of an authorized assignment or as soon as possible after such creditor has received notice of meeting for the consideration of a composition, extension or scheme of arrangement.
- (2) A debt may be proved by delivering or sending through the post in a prepaid and registered letter to the trustee, a statutory declaration verifying the debt.
- (3) The statutory declaration may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.
- (4) The statutory declaration shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The trustee may at any time call for the production of the vouchers.
- (5) The statutory declaration shall state whether the creditor is or is not a secured creditor.
- (6) Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

**Cross References Act:** Debts provable, 44; proof by secured creditors, 46; proof necessary before creditor can vote, 42(9) (10) (11); disallowance of claims, 53; proof in respect of distinct contracts, 47; interest, 49; debts payable at a future time, 50.

**Cross References Rules:** Proof of claims, 115, 116; disallowance of claims, 117, 118; valuation of contingent and unliquidated claims, 119.

<sup>2</sup>S. C. and see further as to proof in partnership cases notes to sections 47 and 51(3).



**Section 45**      **Cross Reference Forms:** Proof of debt, 47; proof of debt of workmen or others, 48.

**Analogous Legislation:** English Act, 1914, Schedule II., Rules 1 to 7.

#### ANALYSIS OF NOTES.

Amendment.

Proof optional but condition precedent to voting and dividends.

Securities to be valued in proof.

Discounts.

Amendment.

Section 45(1) was substituted for the previous subsection by *The Bankruptcy Act Amendment Act 1920*<sup>3</sup>.

Proof optional but condition precedent to voting and dividends.

The provision that every creditor shall prove his debt is directory only<sup>4</sup>, it does not prevent a secured creditor from deciding at any time not to rely on his security, but to come in and prove against the undivided assets<sup>5</sup>. Proof is a condition precedent to the right to vote<sup>6</sup> and to the right to receive dividends<sup>7</sup>.

Securities to be valued in proof.

The statutory declaration referred to in the section is the same as the Proof of Debt set out in Form 47, which requires that particulars of securities be given and that they be valued. It is, however, only a "secured creditor" who is required to value his securities. A secured creditor is defined in section 2(gg)<sup>8</sup>. Under the English Act it is clear that the statutory declaration which a secured creditor who does not either realize or surrender his security is required to file if he wishes to rank for dividends<sup>9</sup>, is the regular form of proof. Although there is a change in the language as used in *The Bankruptcy Act*, it is considered that the statutory declaration referred to in section 46(3), is the same as that mentioned in section 45 and set out in Form 47. While it was said at one time

<sup>3</sup> The previous subsection read: "45(1). Every creditor shall prove his debt as soon as may be after the making of a receiving order or after the date of an authorized assignment."

<sup>4</sup> *In re McMurdo* (1902), 2 Ch 684; 71 L. J. Ch. 691.

<sup>5</sup> S. C.; *Ex parte Williams in re Kit Hill Tunnel Co.*, 16 Ch. D. 590; 50 L. J. Ch. 303; and see s. 37(3).

<sup>6</sup> Section 42(9) (10).

<sup>7</sup> Section 37(1).

<sup>8</sup> See also notes to section 46. Following the general practice in bankruptcy a creditor who holds as collateral for his debt bills of exchange accepted by the bankrupt, should specify the bills in his proof of debt: *In re Ruthen ex parte Kidd* (1898); 5 Mans. 227.

<sup>9</sup> Section 46(3).



that lumping securities is *prima facie* legal<sup>10</sup>, the trustee may insist that proof shall not be made for a lump sum, and may require the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively<sup>1</sup>, at least where the debts are distinct in substance with different rights over as against third persons or with different securities<sup>2</sup>. In view of the difficulties which are consequent on any other course this seems to be the better practice<sup>3</sup>. Certainly no action by the trustee in allowing securities to be lumped will be allowed adversely to affect the rights of other creditors if this can be avoided<sup>4</sup>.

Section 45

The question of what rule is to be followed with respect to trade and cash discounts under the Act has not been covered by the Act or Rules. The rule in England prior to the Act of 1883 and prior to the case of *In re Cumberland, ex parte Worthington*<sup>5</sup>, was that proof could not be made in bankruptcy without deducting cash discounts<sup>6</sup>. *In re Cumberland, ex parte Worthington*, which was a decision of Bacon, C.J., on the special facts of the case, was followed by Rule 8 of Schedule II. of the Act of 1883. That rule corresponds with Rule 8 of Schedule II. of the Act of 1914, which reads:—

Discounts.

"8. A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash."

As to a case of a trade discount between brewer and

<sup>10</sup> *In re Smith and Logan ex parte Fletcher and Brandon* (1895), 2 Mans. 70.

<sup>1</sup> *In re Morris James v. London and County Banking Co.* (1899), 1 Ch. 485; 68 L. J. Ch. 229; 6 Mans. 178.

<sup>2</sup> S. C.

<sup>3</sup> *In re Pearce* (1909), 2 Ch. 492; 78 L. J. Ch. 628; 16 Mans. 191.

<sup>4</sup> S. C. and *In re Morris James v. London and County Banking Co.*, *supra*.

<sup>5</sup> (1876), 3 Ch. D. 803.

<sup>6</sup> *Ex parte Pigou* (1818), 3 Madd. 136, following *Ex parte Aynsworth* (1799), 4 Ves. 678.



Section 46 retailer under Schedule II. Rule 8, see *Chambers & Co. v. Gunstone*<sup>1</sup>.

Provable debts are discussed in the notes to section 44. The rules which the trustee should follow in the acceptance or rejection of proofs are set out in the notes to section 53.

### *Proof by Secured Creditors.*

Proof by  
secured  
creditor.

May prove  
whole debt  
on surrender.

Secured  
creditor  
to value  
securities.

Creditor to  
identify  
property on  
which he  
claims lien.

Dividend for  
balance, and  
penalty for  
contraven-  
tion.

- 46 (1) If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.
- (2) If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove for his whole debt.
- (3) If a secured creditor does not either realize or surrender his security he shall, within thirty days after the date of the receiving order, or of the making of the authorized assignment, or within such further time as may be allowed by the court or the inspectors, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given and the value at which he assesses each thereof. Every creditor shall also, upon demand of the trustee, identify to and for the trustee, within ten days after such demand, any property comprised within the estate of the debtor in, upon or against which he, the creditor, claims to hold any right, interest, lien or security. A creditor shall be entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security, and if any creditor omits or refuses to identify property as in this subsection provided, and within the time so provided (unless it be extended in writing by the trustee or by the

<sup>1</sup> (1897), 76 L. T. 780.



court), his right, interest, lien or security in, upon or against such property shall, by force of this Act, and without more, at the expiration of the time limited, become forfeited to the estate of the debtor. Section 46

- (4) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value. Power of trustee.
- (5) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase. May order security to be sold.
- (6) Notwithstanding subsections four and five of this section the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued. Creditor may require trustee to elect to exercise power.
- (7) Where a security has been realized as provided by this section, the net amount realized shall be paid to the secured creditor and shall be substituted for the amount at which he valued such security in his claim and shall be treated in all respects as an amended Substitution of amount realized.



## Section 46

Secured  
creditor may  
amend.

Rights and  
liabilities  
of creditor  
where  
valuation  
amended.

Exclusion  
for non-  
compliance.

No creditor  
to receive  
more than  
100 cents  
on dollar.

valuation by the secured creditor. The costs and expenses of any such sale shall be in the discretion of the court.

- (8) If the trustee has not elected to acquire the security as hereinbefore provided, a creditor may at any time within two months after filing his claim amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court.
- (9) Where a valuation has been amended in accordance with the foregoing subsection, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money, for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.
- (10) If a secured creditor does not comply with the foregoing subsections he shall be excluded from all share in any dividend.
- (11) Subject to the provisions of subsections five and six of this section, a creditor shall in no case receive more than one hundred cents in the dollar and interest as provided by this Act.



**Cross References Act:** Secured creditor defined, 2(*gg*); rights of secured creditors preserved on making of R. O. or A. A., 6(1), 10, cf. 11(1) (*b*); proof of debts, 45; debts provable, 44; voting by secured creditors, 42(10). Section 46

**Cross Reference Rules:** Proof of claims, 115, 116.

**Cross References Forms:** Proof of debt, 47; creditor's petition, 2.

**Analogous Legislation:** English Act, 1914, Schedule II., Rules 10-18; *Dominion Winding-up Act*, 1906, ss. 76-82.

#### ANALYSIS OF NOTES.

Rules in bankruptcy differ from Winding-up and Assignments.

Only creditor with security on estate of debtor need value.

Four courses open to secured creditor.

- (1) Reliance on security.
- (2) Realization and proof.
- (3) Surrender and proof.
- (4) Proof and valuation.

46(4) (5) Rights of trustee.

46(6) Creditor may call on trustee to elect to redeem.

46(8) Amendment of valuation.

Withdrawal of proof.

Retainer of executor.

Section 46(3) is in the form in which it was enacted by section 38 of *The Bankruptcy Act Amendment Act 1921*<sup>s</sup>.

Section 46 deals mainly with the rights of secured creditors when proof is made. It also touches on the rights of secured creditors when no proof is sought to be made, and should be read with sections 6(1) and 10 and 22(2).

The rules laid down in section 46 with respect to the valuation of securities differ from those in *The Winding-up Act* and from the rules under the various assignments Acts. Under *The Winding-up Act*, and also under certain provincial Acts, a creditor holding a claim based on a negotiable instrument upon which

Rules in  
bankruptcy  
differ from  
winding up  
and assign-  
ments.

<sup>s</sup> The previous section read:

46. (3) If a secured creditor does not either realize or surrender his security, he shall within thirty days of the date of the receiving order, or of the making of the authorized assignment, or within such further time as may be allowed by the inspectors, or in case they shall refuse, then within such further time as may be allowed by the court, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given, and the value at which he assesses each thereof. He shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.



**Section 46** the debtor is only indirectly or secondarily liable is considered to hold security if the instrument is not mature or exigible, and is required to put a value on the liability of the person primarily liable<sup>9</sup>.

Only creditor with security on estate of debtor need value.

Under *The Bankruptcy Act* it is only a "secured creditor" who is required to value his security if he wishes to prove; and he only is a secured creditor who has a security on the property of the debtor<sup>10</sup>. Thus a person holding security on property not belonging to the debtor is not a secured creditor and need not value his security<sup>11</sup>, as where a separate creditor holds a security on the joint estate<sup>1</sup>, or where a joint creditor holds a security on the separate estate<sup>2</sup>, or where all the beneficial interest in the security has passed to the creditor<sup>3</sup>, or to some other person<sup>4</sup>. Bills of Exchange accepted by various persons and handed to bankers by a debtor are not, at least while the bills are held "pending discount", securities which have to be valued<sup>5</sup>. Where a creditor is not a "secured creditor", and yet holds security, he is entitled to prove for the whole amount of his debt and to take a dividend on the whole<sup>6</sup>, subject to the qualification that he must not ultimately receive more than 100 cents on the dollar<sup>7</sup>.

<sup>9</sup> R. S. C. 1906, c. 144, s. 79; R. S. O. 1914, c. 124, s. 25(5); R. S. M. 1913, c. 12, s. 29.

<sup>10</sup> See 2(gg).

<sup>11</sup> *In re Plummer*, 1 Phil. 56; *Ex parte Shepherd*, 2 M. D. & D. 204; *Ex parte Parr in re Leigh*, 1 Rose 76; *Ex parte West Riding Banking Co. in re Turner*, 19 Ch. D. 105.

<sup>1</sup> *In re Jones* (1878), 2 O. A. R. 626, and see *In re Chaffey* (1870), 30 U. C. Q. B. 64, 72, 73; *Ex parte Shepherd*, 2 M. D. & D. 204; *Ex parte English and American Bank in re Fraser, Trenholm & Co.* (1869), L. R. 4 Ch. 49, followed in *Martin v. McMullan* (1890), 19 O. R. 230; *affd.* 18 O. A. R. 559; *In re Jones ex parte Consolidated Bank* (1878), 2 O. A. R. 626; *Ex parte Manchester and Liverpool Bank in re Littler*, L. R. 18 Eq. 249; 43 L. J. Bank. 73.

<sup>2</sup> *Ex parte Caldicott in re Hart* (1884), 25 Ch. D. 716, 722; 53 L. J. Ch. 668; *Ex parte Watson in re Walker* (1880), 42 L. T. 516; *Ex parte Dickinson in re Foster* (1875), L. R. 20 Eq. 767.

<sup>3</sup> *In re Hallett & Co. ex parte Cocks, Biddulph & Co.* (1894), 2 Q. B. 256; 63 L. J. Q. B. 676; 1 Mans. 83; *Bourbeau Co. v. Stewart MacDonald Export Co.* (1917), Que. 26 K. B. 315.

<sup>4</sup> *In re Ottawa Porcelain Co.* (1900), 31 O. R. 679, 692; 20 C. L. T. 179.

<sup>5</sup> *Ex parte Schofield in re Firth* (1879), 40 L. T. N. S. 464, 823. See further notes to 2(gg).

<sup>6</sup> *Eastman v. Bank of Montreal* (1885), 10 O. R. 79.

<sup>7</sup> S. C. and Young v Spiers (1889), 16 O. R. 672.



A secured creditor may act in any one of four ways: Section 46

1. He may, subject to the provisions of section 22 (2), rely solely on his security and decide not to prove.<sup>8</sup> Four courses open to secured creditor.

2. He may, subject to the provisions of section 22(2), realize his security and prove for the balance.<sup>9</sup> (1) Reliance on security.  
(2) Realization and proof.  
It is a general rule in bankruptcy that there is to be no proof for interest accruing subsequently to the bankruptcy<sup>10</sup>. Therefore while a secured creditor may appropriate the proceeds of his security in satisfaction of principal and interest due at the date of the receiving order and then prove for the balance, he is not entitled to apply the proceeds in payment first of interest accruing subsequently to the date of the receiving order and then to prove in the winding-up for the principal<sup>1</sup>. In the event of a surplus, however, dividends will be treated as applicable first in payment of any interest borne by the debt and then in reduction of principal<sup>2</sup>. It is on the same principle that in the administration of joint and separate estates a creditor, whose proof is admitted against both the separate estates of two bankrupts who have been partners, is not entitled to receive any dividend in respect of interest, which has accrued on his debt

<sup>8</sup> *Deacon v. Driffl* (1879), 4 O. A. R. 335; *In re Brampton Gas Co.* (1902), 4 O. L. R. 509; *Capital Trust v. Yellowhead Pass Coal Co.* (1916), 9 A. L. R. 463; 27 D. L. R. 25; 33 W. L. R. 873; and see *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681. The provision in section 45(1) that every creditor shall prove his debt is directory only: *In re McMurdo* (1902), 2 Ch. 684; 71 L. J. Ch. 691.

<sup>9</sup> Section 46(1). *In re Hurst* (1871), 31 U. C. Q. B. 116; *In re Brampton Gas Co.* (1902), *supra*; dis *Deacon v. Driffl* (1879), *supra*; *In re Beaty* (1880), 6 O. A. R. 40, and remarks of Boyd, C., in *Barber v. Wade* (1916), 37 O. L. R. 459; see *per* Middleton, J., in *Union Bank of Canada v. Makepeace* (1917), 40 O. L. R. 368, 372, 373, for comments on the difference between bankruptcy legislation and *The Assignments Act*. A secured creditor may under the English Act at any time come in and prove against the undivided assets: *Re McMurdo* (1902), *supra*; *Ex parte Williams in re Kit Hill Tunnel Co.*, 16 Ch. D. 590; 50 L. J. Ch. 303. The English Act contains no 30-day provision such as appears in section 46(3).

<sup>10</sup> *In re Savin* (1872), L. R. 7 Ch. 760.

<sup>1</sup> *Quartermaine's Case in re London, Windsor and Greenwich Hotels Co.* (1892), 1 Ch. 639; 61 L. J. Ch. 273; *Re Bonacino ex parte Discount Banking Co.* (1894), 1 Mans. 59; 147.

<sup>2</sup> *In re Humber Ironworks and Shipbuilding Co.; Warrant Finance Co.* (1869), 4 Ch. 643; *Hughes' Claim; In re International Contract Co.* (1872), 13 Eq. 623.



**Section 46** subsequently to the date of the adjudication, until the joint creditors have been paid the principal of their debts in full<sup>3</sup>. A secured creditor may however set off against interest accrued since winding-up, the profits realized from the security since the winding-up<sup>4</sup>, and he may allocate his security to that part of his debt in respect of which he has no right of proof<sup>5</sup>.

A creditor may not by indirect means obtain more than he could by realization and proof. Thus if A.B. holds security on the estate of the debtor for payment of a negotiable instrument and he negotiates the bill to C.D., who proves against the estate of the bankrupt instead of claiming against A.B., the court will not allow A.B. to retain the full proceeds of his security, but will make him account to the trustee for the amount by which the dividend paid on the bill exceeded that which would have been paid if the value of the security had been deducted<sup>6</sup>.

(3) Surrender and proof.

3. He may surrender his security and prove for his whole debt<sup>7</sup>. In this case the surrender being for the general benefit of creditors, the trustee stands in the place of the secured creditor and the rights of subsequent mortgagees are not accelerated<sup>8</sup>.

(4) Proof and valuation.

4. He may prove, valuing his security and ranking for the difference<sup>9</sup>. Section 46(3) does not in terms say that if a secured creditor does not either realize or surrender his security he may prove by valuing his secur-

<sup>3</sup> *In re Collie ex parte Findlay* (1881), 17 Ch. D. 334.

<sup>4</sup> *Quartermaine's Case in re London, Windsor and Greenwich Hotels Co.*, *supra*.

<sup>5</sup> *In re Fox and Jacobs ex parte The Discount Banking Co.* (1893), 10 Mor. 295; *Ex parte Glyn* (1840), 1 M. D. & D. 25; *Ex parte Hunter* (1801), 6 Ves. 94.

<sup>6</sup> *Baines v. Wright* (1886), 16 Q. B. D. 330.

<sup>7</sup> Section 46(2); *Deacon v. Drifil* (1879), 4 O. A. R. 335. As to whether the surrender must be made within the thirty days mentioned in section 46(3), *quære*.

<sup>8</sup> *Cracknall v. Janson* (1877), 6 Ch. D. 735.

<sup>9</sup> Section 46(3); *Deacon v. Drifil* (1879), *supra*. The rule in winding up was formerly that administered in Chancery whereby a secured creditor might prove and also rely on his security: *Mason v. Bogg*, 2 My. & Cr. 443; *Attorney-General v. Cox*, 3 H. L. C. 240; *Kellock's Case* (1868), L. R. 3 Ch. 769; *In re Barned's Banking Co.* (1869), L. R. 5 Ch. 18; *Ebbw Vale Company's Case in re Contract Corporation* (1869), L. R. 5 Ch. 112; *In re Blakely Ordnance Co.* (1869), L. R. 8 Eq. 244; *In re Barned's Banking Co.*, *Coupland's Claim* (1869), L. R. 8 Eq. 472; *In re Baker Bray's Claim*, 3 Ch. Ch. 499; *Beatty v. Samuel*, 29 Gr. 105.



ity, and shall rank for dividends on the balance due after deducting the value placed upon it, but it is considered that this is the purport of the section. There is no time limited in the corresponding English Rule within which proof must be made. The circumstances will require to be exceptional before the court will refuse to allow the proof to be filed<sup>10</sup>. There is nothing in this section nor is there any rule in bankruptcy which will forfeit the debt or the security of a petitioning creditor who fails either to value his security<sup>11</sup>, or to state that he is ready to surrender it for the benefit of creditors<sup>1</sup> for the rule in bankruptcy is election not forfeiture, and there is no election with respect to proof when a petition is presented<sup>2</sup>. But if a secured creditor proves for the full amount of his debt without valuing his security, this is evidence of an election to give up his security; and if he votes or receives dividends in respect of his whole debt, he will be deemed to have surrendered his security unless the omission to value arose from inadvertence<sup>3</sup>.

Although it was said at one time that lumping securities is *prima facie* legal<sup>4</sup>, the trustee may insist that proof shall not be made for a lump sum and may require the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively,<sup>5</sup> at least where the debts are

<sup>10</sup> See s. 37(3), 46(9), and *In re McMurdo, Penfield v. McMurdo* (1902), 2 Ch. 684; 71 L. J. Ch. 691; *Ex parte Williams in re Kit Hill Tunnel Co.* (1881), 16 Ch. D. 590; 50 L. J. Ch. 303. Owing to the precarious nature of a lien holder's security and the difficulty of valuing it the Court has extended the time for filing, proof and valuing the security until fifteen days after the final adjudication upon the claims of lien holders in the mechanics' lien actions, and the realization of the security thereunder: *In re Rockland Chocolate and Cocoa Co., Ltd.* (1921), 1 C. B. R. 452 (Orde, J.).

<sup>11</sup> Which may consist only of an interest in common with others under a mortgage: *In re Thunder Hill and Bowker* (1896), 5 B. C. R. 21.

<sup>1</sup> *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

<sup>2</sup> S. C.

<sup>3</sup> S. C. *Ex parte Ashworth in re Hoare* (1874), L. R. 18 Eq. 705; 43 L. J. Bank. 142. This rule was not the rule in Manitoba under *The Assignments Act: Box v. Bird's Hill Sand Co.* (1913), 23 M. L. R. 415; 24 W. L. R. 706.

<sup>4</sup> *In re Smith & Logan ex parte Fletcher & Brandon* (1895), 2 Mans. 70.

<sup>5</sup> *In re Morris, James v. London and County Banking Co.* (1899), 1 Ch. 485; 68 L. J. Ch. 299; 6 Mans. 178.



**Section 46** distinct in substance with different rights over as against third persons or with different securities<sup>6</sup>. In view of the difficulties which are consequent on any other course, this seems to be the better practice<sup>7</sup>. Certainly no action by the trustee in allowing securities to be lumped will be allowed adversely to affect the rights of other creditors if this can be avoided<sup>8</sup>. In estimating the value of his security a creditor is entitled to bring into account the costs of an action for damages for conversion of the property to which he has been subjected by reason of the fact that the bankrupt was not the owner of the property comprised in the security<sup>9</sup>. Where a creditor, holding as security for the payment of his debt a policy of life insurance and a promissory note by a third party as surety, omits to value the policy, which is accordingly given up to the trustee, the surety is discharged to the extent of the value of the policy.<sup>10</sup>

Sec.  
46(4)(5).  
Rights of  
trustee.

Where the creditor proves and values his security, the trustee may redeem the security on payment to the creditor of the assessed value; or if the trustee is dissatisfied with the value he may require it to be offered for sale<sup>1</sup>. The trustee has a right of redemption under section 22(2); but redemption in such case will depend on the terms of the contract of pledge.

Sec. 46(6).  
Creditor  
may call on  
trustee to  
elect to  
redeem.

The provision in section 46(6) permitting the creditor to call on the trustee to elect whether he will redeem, may be compared with section 84 of *The Insolvent Act* of 1875,<sup>2</sup> which gave the assignee power, under the authority of the creditors to consent to the retention of the property by the secured creditor. It was held in various cases under that Act that where a secured creditor had valued his security for the purpose of proof, a formal resolution of the assignee

<sup>6</sup> S. C.

<sup>7</sup> *In re Pearce* (1909), 2 Ch. 492; 78 L. J. Ch. 628; 16 Mans. 191.

<sup>8</sup> S. C.; *In re Morris, James v. London and County Banking Co.*, *supra*.

<sup>9</sup> *Ex parte Carr in re Hoffman* (1879), 11 Ch. D. 62; 48 L. J. Bank. 69.

<sup>10</sup> *Rainbow v. Juggins* (1880), 5 Q. B. D. 138, 422; 49 L. J. Q. B. 353, 718.

<sup>1</sup> Section 46(4) (5).

<sup>2</sup> See ss. 84, 85, 86.



allowing the creditor to retain the security was not necessary and his assent could be inferred from what ~~had~~ taken place<sup>3</sup>. The fact that if the trustee does not elect to redeem within one month after receiving the notice, or such further time or times as the court may allow, the equity of redemption which is vested in the trustee vests in the creditor, will make it important to preserve evidence of the demand and non-election. Section 48

Section 46(8) with respect to the amendment of a valuation<sup>4</sup> is not in the language of the corresponding English section. The change in phraseology raises a difficulty. The words "If the trustee has not elected to acquire the security as hereinbefore provided" can only refer either to redemption by the trustee under section 46(4), or to election by the trustee to exercise that right after having been called on so to do by the creditor under section 46(6). The use of the expression "has not elected" in section 46(8) makes it appear probable that 46(8) refers to 46(6) and not to 46(4). This conclusion is fortified by the probability that the words under discussion appear to have been inserted to adopt the decision in *Ex parte Norris, in re Sadler*<sup>5</sup>, in which it was held that a creditor might amend his valuation after receipt of written notice from the trustee of his intention to redeem under section 46(4), where the creditor had not called on the trustee to elect under 46(6), and where there had been no payment by the trustee<sup>6</sup> to the creditor of the assessed value in exercise of the trustee's right of redemption. That case also seems to have suggested the insertion of the words "within two months after filing his claim" which do not appear in the English rule<sup>7</sup>. On the other

<sup>3</sup> *Bell v Ross* (1885), 11 O. A. R. 458; *Taylor v. Davies* (1917); 41 O. L. R. 403, 434, *et seq.*; *Bank of Ottawa v. Newton* (1906), 4 W. L. R. 508.

<sup>4</sup> Apart from mutual mistake or fraud there could be no amendment of the value of a security under the Act of 1875 after election by the assignee to allow the creditor to retain his security: *In re Street* (1879), 15 C. L. J. 86.

<sup>5</sup> (1886), 17 Q. B. D. 728; 56 L. J. Q. B. 93; 3 Mor. 260.

<sup>6</sup> Tender it seems is not sufficient: *In re Newton ex parte National Provincial Bank of England* (1896), 2 Q. B. 403; 65 L. J. Q. B. 686; 3 Mans. 200.

<sup>7</sup> See as to other circumstances *In re Fanshawe ex parte Le Marchant* (1905), 1 K. B. 170; 74 L. J. K. B. 153; 12 Mans. 7; *In re Newton ex*



**Section 46** hand, it is difficult to see how 46(8) can be made to fit exactly with 46(6). If the trustee having been called upon to elect does not do so within one month thereafter<sup>8</sup>, the equity of redemption of the property vests in the creditor. Is the secured creditor then entitled after the expiration of the month to amend his valuation and proof? He is no longer a secured creditor, for the equity of redemption having vested in him he holds no security on the property of the debtor. He may no doubt, however, amend his valuation and proof before the expiration of the month mentioned in section 46(6), prior that is, to a declaration by the trustee of his election to purchase at the creditor's valuation.<sup>9</sup>

A creditor secured by mortgage may in a proper case amend his valuation notwithstanding the opposition of a subsequent mortgagee<sup>10</sup>. In case of an evident mistake<sup>1</sup>, an amendment of a proof will be allowed, and this even after the creditor has voted in the choice of a trustee<sup>2</sup>, unless the matter is *res judicata*<sup>3</sup>. An amendment will not be allowed where a composition has been fixed on the basis of the valuation of the security made in the proof, and to allow an amendment would upset the whole proceeding<sup>4</sup>. Where a secured creditor is the petitioning creditor and gives an estimate in his petition of the value of his security

*parte National Provincial Bank of England, supra; In re Morter ex parte Nichols* (1897), 76 L. T. 532.

<sup>8</sup> Under the English Act the period is six months, Schedule II., Rule 13(c).

<sup>9</sup> *Ex parte Norris in re Sadler* (1886), 17 Q. B. D. 728; 56 L. J. Q. B. 93; 3 Mor. 260.

<sup>10</sup> *Ex parte Arden* (1884), 14 Q. B. D. 121; 2 Mor. 1.

<sup>1</sup> As where a creditor had valued his security at the full amount of his claim (it being in fact worthless), in the mistaken belief that he had lien notes to cover it: *Canada Furniture Co. v. Bunning* (1918), 39 D. L. R. 313; 1 W. W. R. 31 or where a creditor with a possible claim to a maritime lien had without advice of counsel filed a claim for wages in winding up proceedings in which no mention was made of any security; *Re Lake Winnipeg Transportation Co.* (1892), 8 Man. R. 463; and see notes to section 42(10).

<sup>2</sup> *Ex parte Schofield in re Firth* (1879), 12 Ch. D. 337; 48 L. J. B. 122; *Ex parte Bagshaw in re Ker* (1879), 13 Ch. D. 304.

<sup>3</sup> *Ex parte Whitton in re Greaves* (1880), 43 L. T. 480.

<sup>4</sup> *Couldery v. Bartrum* (1880), 19 Ch. D. 394; 51 L. J. Ch. 265; and see *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. B. 103.



he is, in the absence of mistake, probably bound by that estimate and will not be allowed to revise his estimate and prove on a different footing<sup>5</sup>, though if he chooses to abstain from proving in the bankruptcy there is nothing in the Act or rules which entitles the trustee to redeem the security at the value placed on it in the petition<sup>6</sup>.

Section 46

A creditor may withdraw his proof before it has been adjudicated upon or used for purposes of voting<sup>7</sup> or claiming a dividend<sup>8</sup> and may tender another<sup>9</sup>. So also if a proof is rejected not on the merits, but on something going to a point of form, he may it seems tender another proof avoiding the point of form objected to<sup>10</sup>. But a creditor whose proof has been rejected on the merits cannot withdraw it, reserving to himself the right to tender a fresh proof, and subsequently tender it in the same form<sup>1</sup>. Where a proof has been put in by a secured creditor and has been admitted for the purpose of voting, leave will not be given allowing a conditional withdrawal of the proof while a motion is pending to get rid of it.<sup>2</sup>

Withdrawal of proof.

An executor who proves abandons his right of retainer<sup>3</sup> unless he withdraws his proof in time<sup>4</sup>.

Retainer of executor.

<sup>5</sup> *In re Button ex parte Voss* (1905), 1 K. B. 602; 74 L. J. K. B. 403; 12 Mans. 111; *In re Lacey ex parte Taylor* (1884), 13 Q. B. D. 128; 1 Mor. 113.

<sup>6</sup> *In re Vautin ex parte Saffery* (1899), 2 Q. B. 549; 68 L. J. Q. B. 971; 6 Mans. 391, distinguishing *In re Lacey ex parte Taylor*, *supra*.

<sup>7</sup> But where there has been a mistake and a person claiming to be a secured creditor has put in a proof and has voted and it appears that there was no debt he may withdraw his proof: *In re Burr ex parte Clarke* (1892), 67 L. T. 465; and see notes to section 42(10).

<sup>8</sup> *In re Attree ex parte Ward* (1907), 2 K. B. 868; 77 L. J. K. B. 130; 15 Mans. 19.

<sup>9</sup> *In re Deerpurth ex parte Seaton* (1891), 60 L. J. Q. B. 412; 8 Mor. 258, but see *In re British Columbia Pottery Co.* (1895). 4 B. C. R. 525, and *cf. In re Brampton Gas Co.* (1902), 4 O. L. R. 509.

<sup>10</sup> *In re Deerpurth ex parte Seaton*, *supra*.

<sup>1</sup> S. C.

<sup>2</sup> *In re Clark ex parte Buenos Ayres and Pacific Railway Co., Ltd.* (1901), 1 K. B. 655; 70 L. J. K. B. 259; 8 Mans. 156.

<sup>3</sup> *Stammers v. Elliott* (1868), L. R. 3 Ch. 195; 37 L. J. Ch. 353.

<sup>4</sup> *In re and ex parte Rhoades* (1899), 1 Q. B. 905; 2 Q. B. 347; 68 L. J. Q. B. 804; 6 Mans. 277; and see further as to executor's right of retainer; *In re Watson, Turner v. Watson* (1896), 1 Ch. 925; *In re Hodgson, Hodgson v. Fox* (1878), 9 Ch. D. 673; *In re Orpen, Beswick v. Orpen* (1880), 16 Ch. D. 202; 50 L. J. Ch. 25. It has been held by Boyd, C., in *Tillie v. Springer* (1891), 21 O. R. 585, that the executor's



## Section 47

The question of double proof against one estate is treated in the notes to section 44. As to proof against two estates in the case of distinct contracts, see section 47; and as to the administration of joint and separate estates, see notes to 51(3).

*Proof in respect of Distinct Contracts.*

Proof in  
respect of  
distinct  
contracts.

47. If a debtor was, at the date of the receiving order or authorized assignment, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

**Cross References Act:** Ranking of claims where different estates 28 (2); administration of joint and separate estates 51 (3); proof of debts 45; proof by secured creditors 46; debts provable 44.

**Analogous Legislation:** English Acts, 1914, Schedule II., Rule 19; 1883, Schedule II., Rule 19; 1869, s. 37; 1861, s. 152.

ANALYSIS OF NOTES.

Old rule.

Cases still under old rule.

Cases outside both the section and the old rule.

Object of the section.

Breaches of trust.

Old rule

The old rule was that if a creditor held say a promissory note signed by A. and B in their individual capacities, and also by the firm of A and B, he must elect from which estate he would receive dividends<sup>b</sup>. He was not allowed to receive dividends from the two estates<sup>c</sup>; but this rule applied only

right to impound shares under a will as against a debt due from the beneficiaries is a security on the estate of the beneficiary. See, however, *per* Scrutton, L.J., *In re Melton, Milk v Towers* (1918), 1 Ch. 37, 60.

<sup>b</sup> *Ex parte Honey in re Jeffery* (1871), L. R. 7 Ch. 178; 41 L. J. Bank 9. See notes to section 51(3).

<sup>c</sup> Which is not the same thing as double proof against one estate, see notes to section 44.



where both estates were being administered in bankruptcy or insolvency<sup>7</sup>. Section 47

There are cases to which the old rule still applies, for the section speaks only of liabilities in respect of contracts. There has been no change in the law in cases of fraud where there is no contractual liability in equity<sup>8</sup>. Where the fraud affects a partnership as where one partner alone is guilty, but the profits of the fraud have found their way into the partnership, both the separate and the joint estates are liable, but the party defrauded may not go against both; he must make his election<sup>9</sup>. It is not too late for him to make his election even after the receipt of a dividend where he had tendered his proof against one estate in ignorance of the fact that he had any right of election and where there is no estoppel<sup>10</sup>. In such case on refunding the dividend with interest he may elect<sup>1</sup>.

There are also cases which never were within the old rule and so are outside the section. Such a case occurs where a debt has been incurred apparently for an individual but in reality on behalf of a firm. On general legal principles, apart from any question of administration in bankruptcy, the creditor must in such case elect whether he will take the joint liability of the firm or the separate liability of the contractor<sup>2</sup>. Further where traders possess two properties, one situate abroad and the other situate in this country, and the foreign court employs the foreign property in paying the foreign creditors a dividend, such creditors cannot afterwards prove in a Canadian bankruptcy without first accounting for what they have received abroad, for in such case there are not two distinct firms<sup>3</sup>.

The intention of the section, the principle of which first appeared in the Act of 1861, is Object of the section.

<sup>7</sup> See *Ex parte Thornton* (1859), 3 DeG. & J. 454; *In re Baker* (1871), 3 Ch. Ch. 499.

<sup>8</sup> See *infra*, as to breaches of trust.

<sup>9</sup> *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. Bank. 103.

<sup>10</sup> S. C.

<sup>1</sup> S. C.

<sup>2</sup> *Ex parte Norfolk* (1815), 19 Ves. 455.

<sup>3</sup> *Banco de Portugal v. Waddell* (1880), 5 A. C. 161; 49 L. J. Bank. 33; *Ex parte Wilson in re Douglas* (1872), L. R. 7 Ch. 490; 41 L. J. Bank. 46.



**Section 47** that whenever there is a joint and separate contract and joint and separate estates under administration in bankruptcy, the creditor shall be entitled to prove against and receive dividends from both the joint and separate estates<sup>4</sup>. The sole contractor referred to in the section need not be carrying on business separately<sup>5</sup>. It is not necessary in order that proof may be made against the joint estate that the partners should contract in the firm name if they contract jointly and severally, and if there is a firm in fact<sup>6</sup>. Although there must be distinct contracts they may be contained in one instrument, such for example as a joint and several promissory note<sup>7</sup>. Where there are joint and separate contracts by partners to pay a sum of money, it is immaterial whether or not the money has been advanced for partnership purposes<sup>8</sup>.

Breaches  
of trust.

Although the section speaks only of liabilities in respect of contracts, it should be remembered that the liability of a trustee in respect of a breach of trust was always provable in bankruptcy as a liability arising from a contract to perform his trust and not from a pure tort<sup>9</sup>. Where therefore trust funds, handed by the trustees for investment to a firm in which one of the trustees was a partner, are misappropriated by the firm the defrauded creditors become joint and separate creditors<sup>10</sup>, and proof can be

<sup>4</sup> *Ex parte Honey in re Jeffery* (1871), L. R. 7 Ch. 178; 41 L. J. Bank. 9; and see where there is a security on the separate estate for the joint debt; *Ex parte Watson in re Walker* (1880), 42 L. T. 516; *Ex parte Dickin in re Foster* (1875), L. R. 20 Eq. 767.

<sup>5</sup> *Ex parte Honey in re Jeffery, supra*.

<sup>6</sup> *Re Stone ex parte Welch* (1873), L. R. 8 Ch. 914; 42 L. J. Bank. 73.

<sup>7</sup> The holder of a note can treat the payee and endorser as having incurred a separate liability in respect of his endorsement distinct from his liability as maker: *In re Chaffey* (1870), 30 U. C. Q. B. 64.

<sup>8</sup> *Re Laine & Longman ex parte Berner* (1886), 56 L. T. 170; 56 L. J. Q. B. 153. "It makes no difference who may benefit by the transaction resulting in the debt—the whole question is 'who incurred the debt,'" per Riddell, J., in *Gordon v. Matthews* (1909), 18 O. L. R. 340, 345.

<sup>9</sup> *Finnia Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122, 130; 50 L. J. Ch. 449; *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. Bank. 103, and see notes to section 44.

<sup>10</sup> *Ex parte White in re Neville* (1870), L. R. 6 Ch. 397; 40 L. J. Bank. 73; *Ex parte Poulson in re Davis* (1844), DeG. 79.



made under section 47 against both the joint estate of the firm and the separate estate of the defaulting trustee<sup>1</sup>, and the same rule applies where the partner stands in the fiduciary relation of director<sup>2</sup>. But a limitation has been put to the extension of this rule. The section does not apply to a case where no member of the firm is an express trustee as where a firm, in which two persons were the sole partners, promoted a company and sold to the company a business belonging to the two partners at a large secret profit<sup>3</sup>. The section only applies when the several liability arises out of a distinct contract<sup>4</sup>, as in the case mentioned above where an express trustee joins with other members of his firm in misapplying moneys belonging to his trust. In such case the defaulting trustee is liable as a partner for the breach of the implied trust and as trustee for breach of the express trust<sup>5</sup>.

Section 48

### *Restricted Creditors.*

- 48 (1) Where a married woman has been adjudged bankrupt or has made an authorized assignment, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by him to his wife for the purposes of her trade or business, or claim any wages, salary or compensation for work hereafter done or services hereafter rendered in connection with her trade or business, until all claims of the

Postponement of husband's claim.

<sup>1</sup> *In re Parkers ex parte Shepherd* (1887), 19 Q. B. D. 84; 56 L. J. Q. B. 338, 4 Mor. 135; *Re Macfadyen & Co. ex parte Vizianagaram Mining Co. No. 2* (1908), 2 K. B. 817; 77 L. J. K. B. 1027; 15 Mans. 313.

<sup>2</sup> *In re Macfadyen & Co. ex parte Vizianagaram Mining Co. (No 2)*, *supra*.

<sup>3</sup> *Re Kent County Gas, Light and Coke Co.* (1913), 1 Ch. 92; 82 L. J. Ch. 28; 19 Mans. 358.

<sup>4</sup> "Contractual liability" are the words of Kennedy, L.J., in *Re Macfadyen & Co. ex parte Vizianagaram Mining Co.* *supra*, at 824, 825.

<sup>5</sup> *In re Kent County Gas, Light and Coke Co.*, *supra*.



**Section 48**

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Postpone-  
ment of  
wife's claim.

other creditors of his wife for valuable consideration in money or money's worth have been satisfied.

- (2) Where the husband of a married woman has been adjudged bankrupt or has made an authorized assignment, his wife shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by her to her husband for the purposes of his trade or business, or claim any wages, salary or compensation for work hereafter done or services hereafter rendered in connection with his trade or business, until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied.

Postpone-  
ment of wage  
claims of  
relatives.

- (3) Where any person or firm has been adjudged bankrupt or has made an authorized assignment, any father, son, daughter, mother, brother, sister, uncle or aunt of any such person or of any member of said firm shall not be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to said person or firm exceeding an amount equal to three months' wages, salary or compensation, until all claims of the other creditors of said person or firm for valuable consideration in money or money's worth have been satisfied.

Postpone-  
ment of wage  
claims of  
sharehold-  
ers and  
directors.

- (4) Where any corporation has been adjudged bankrupt or has made an authorized assignment no officer, director or shareholder thereof shall be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to such corporation exceeding an amount equal to three months' wages, salary



or compensation, until all claims of the other creditors of said corporation for valuable consideration in money or money's worth have been satisfied. Section 48

**Cross Reference Act:** Certain claims under settlements postponed, 29(2) (3) ; priority of wage claims, 51(1) ; relation back of bankruptcy of debtor, 4(10) ; corporation defined, 2(k), 2(aa).

**Analogous Legislation:** English Acts, 1914, s. 36; 1913, s. 12(4). *The Married Women's Property Act*, 1882, s. 3. *Cf. The Partnership Act*, 1890 [53 and 54 Vict. c. 39] ss. 2 and 3.

#### ANALYSIS OF NOTES.

Restricted creditor cannot prove or vote.  
Restriction is statutory.  
Onus of proof.  
Cases outside the section.  
Retainer of executrix.  
Claims for wages, etc.

In cases falling within this section, the restricted creditor can neither prove nor vote<sup>6</sup>. Restricted creditor cannot prove or vote.

Were it not for section 48(2), a wife might prove against her husband's estate and rank for dividends in competition with his other creditors<sup>7</sup>. Restriction is statutory.

The section only applies where money has been lent by a wife to her husband for the purpose of his trade or business; money lent by a wife to her husband for private purposes may be proved for by her, and she may receive a dividend in competition with other creditors.<sup>8</sup>

A wife seeking to prove in her husband's bankruptcy must make out a *prima facie* case, but unless the natural inference from the particular facts of the Onus of proof.

<sup>6</sup> *In re Genese ex parte District Bank of London* (1885), 16 Q. B. D. 700; 55 L. J. Q. B. 118; 2 Mor. 283; following *Ex parte Taylor in re Grason* (1879), 12 Ch. D. 366. a decision on the 5th section of Bovill's Act. See also *Ex parte Mills*, L. R. 8 Ch. 569.

<sup>7</sup> *Warner v. Murray* (1889), 16 S. C. R. 720; *Totten v. Bowen* (1882), 8 O. A. R. 602; *In re Miller* (1877), 1 O. A. R. 393; *Pett v. Attwood* (1907), 9 O. W. R. 178, 748 and compare *O'Reilly v. O'Reilly* (1910), 21 O. L. R. 201; *affd. sub nom. Garland, Son & Co. v. O'Reilly* (1911), 44 S. C. R. 197.

<sup>8</sup> *In re and ex parte Tidswell* (1887), 56 L. J. Q. B. 548; 4 Mor. 219; *Mackintosh v. Poyose* (1895), 1 Ch. 505; 64 L. J. Ch. 274; 2 Mans. 27; *In re Clark ex parte Schulze* (1898), 2 Q. B. 330; 67 L. J. Q. B. 759; 5 Mans. 201.



**Section 48** case is that the money was loaned by the wife<sup>9</sup> for the purpose of the husband's trade or business, the onus is not on her to prove that the money was lent for some other purpose.<sup>10</sup> It has been the rule in Ontario in cases where the wife claims that she has advanced money to her husband as a loan to require clear evidence of an actual advance of money as a loan and not as a gift<sup>1</sup>, and if the circumstances call for investigation this may affect the disposition of costs<sup>2</sup>.

Cases outside the section.

The section does not apply to the case of a loan by the wife of a trader to the firm of which her husband is a member<sup>3</sup>; nor is property deposited by a wife with her husband's bankers as security for a loan to be made by them to him within the section. The wife in such case stands in the position of a surety or quasi surety to the bankers for her husband's debt, and if she pays off the bank she has a right to be treated as having the bank's security and a right to exoneration by her husband, which gives her a right of proof against his estate without deducting the value of the security<sup>4</sup>.

Retainer of executrix.

In England section 3 of *The Married Women's Property Act 1882* (which was the progenitor of section 48(2) of *The Bankruptcy Act*) and section 10 of *The Judicature Act of 1875*, prevent a wife from proving in the administration of her deceased husband's insolvent estate for a loan made by her to him for the purpose of his business until his creditors for value

<sup>9</sup> See where a trader in England had gone through the ceremony of marriage with his deceased wife's sister and therefore was as Bacon, C.J., expressed it, "to all intents and purposes married except for the provisions of the law of England"; *In re Beale ex parte Corbridge* (1876), 4 Ch. D. 246; 46 L. J. Bank. 17.

<sup>10</sup> *In re Genese ex parte District Bank of London* (1885), 16 Q. B. D. 700; 55 L. J. Q. B. 118; 2 Mor. 283; as explained *In re and ex parte Cronmire* (1901), 1 K. B. 480; 70 L. J. K. B. 310; 8 Mans. 140.

<sup>1</sup> See *In re Miller* (1877), 1 O. A. R. 393; *Rice v. Rice* (1899), 31 O. R. 59; (1900), 27 A. R. 121; *Ellis v. Ellis* (1913) 5 O. W. N. 561; 25 O. W. R. 539; 15 D. L. R. 100.

<sup>2</sup> *Pett v. Attwood* (1907), 9 O. W. R. 178, 748; cf. *Tidey v. Craib* (1884), 4 O. R. 696.

<sup>3</sup> *In re Tuff & Nottingham ex parte Nottingham* (1887), 19 Q. B. D. 88; 56 L. J. Q. B. 440; 4 Mor. 116.

<sup>4</sup> *In re and ex parte Cronmire* (1901), 1 K. B. 480; 70 L. J. K. B. 310; 8 Mans. 140.



have received 20 shillings in the pound<sup>5</sup>, yet if she is her deceased husband's executrix, she can as against those creditors retain the amount of the loan out of assets in her hands as executrix<sup>6</sup>. Section 49

The expression used in section 48, in dealing with claims for wages, etc., is "wages, salary or compensation". It may be that this phrase does not include "commission", for it should be noted that the corresponding expression in section 51(1) is "wages, salaries, commission or compensation". It may also be that a wife can claim "wages, salary or compensation" to an amount exceeding three months' wages, salary or compensation where her husband is a member of the firm<sup>8</sup>. Claims for wages, etc.

The persons mentioned in section 48(3)(4) may be preferred creditors to the extent of three months' wages, salary or compensation<sup>9</sup>. A director is not *qua* director a "servant" of the company, and so is not entitled to priority with respect to his remuneration as such<sup>10</sup>; but a director may be a servant of the company in another capacity<sup>1</sup>.

### Interest.

49. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order or authorized assignment and provable under this Act, the creditor may prove for Interest.

<sup>5</sup> *In re Leng Tarn v. Emmerson* (1895), 1 Ch. 652; 64 L. J. Ch. 468; 12 R. 202.

<sup>6</sup> *In re Ambler Wood v. Ambler* (1905), 1 Ch. 697; 74 L. J. Ch. 367; *In re May Crawford v. May* (1890), 45 Ch. D. 499; 60 L. J. Ch. 34.

<sup>7</sup> *Parkin Elevator Co., Ltd., Dunsmoor's Claim* (1916), 37 O. L. R. 227, where previous cases are reviewed.

<sup>8</sup> On the analogy of *In re and ex parte Tidsweil* (1887), 56 L. J. Q. B. 548; 4 Mor. 219; *Mackintosh v. Pogose* (1895), 1 Ch. 505; 64 L. J. Ch. 274; 2 Mans. 27; *In re Clark ex parte Schulze* (1898), 2 Q. B. 330; 67 L. J. Q. B. 759; 5 Mans. 201.

<sup>9</sup> Section 51(1).

<sup>10</sup> *In re Newspaper Proprietary Syndicate* (1900), 2 Ch. 349; 69 L. J. Ch. 578; 8 Mans. 65.

<sup>1</sup> *In re Beeton & Co.* (1913), 2 Ch. 279; 82 L. J. Ch. 464; 20 Mans. 222. and see notes to section 51(1).



## Section 49

interest at a rate not exceeding six per cent. per annum to the date of the order or authorized assignment from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

**Cross References Act:** Debts provable, 44; debts payable at a future time, 50; proof of debts, 45; proof by secured creditors, 46.

**Analogous Legislation:** English Act, 1914, Schedule II., Rule 21.

## ANALYSIS OF NOTES.

Surety paying a promissory note may claim interest.

General rule that no proof for interest accruing after receiving order.

Secured creditors.

Exceptions to general rule.

As this section has been given the heading "interest", it has been thought convenient to discuss here the rules with respect to proof for interest in bankruptcy. The section indicates in what cases proof may be made for interest accruing due before the date of the receiving order, where the contract itself does not provide for interest.

Surety  
paying a  
promissory  
note may  
claim  
interest.

In those jurisdictions in which the equivalent of section 5 of *The Mercantile Law Amendment Act 1856* is in force, a surety to a promissory note who pays the note at maturity has a claim for a certain sum payable by virtue of a written instrument which entitles him to prove for interest on the sum paid on the note from the time of payment to the date of the receiving order<sup>2</sup>.

General rule  
that no proof  
for interest  
accruing  
after receiv-  
ing order.

It is a general rule of long standing in bankruptcy, in which this section makes no change, that there may not be proof for interest accruing subsequently to the date of the receiving order<sup>3</sup>; but this rule is applicable

<sup>2</sup> *In re Evans ex parte Davies* (1897), 4 Mans. 114.

<sup>3</sup> *In re Savin* (1872), L. R. 7 Ch. 760; *Ex parte Lubbock* (1863), 4 DeG. J. & S. 516; *Quartermaine's Case in re London, Windsor and*



only as between trustee and creditor in the bankruptcy, Section 49  
and not as between creditor and subsequent mort-  
gagees after the bankruptcy has been annulled<sup>4</sup>.

Following the general rule secured creditors who Secured  
creditors.  
realize their security<sup>5</sup> and prove for the balance may  
not retain out of the proceeds interest subsequent to  
the date of the receiving order<sup>6</sup>. If they do so and if  
dividends are paid, they will be ordered to make  
refund, even after a considerable lapse of time and  
change of circumstances<sup>7</sup>. But a secured creditor may  
allocate the proceeds of his security in payment of  
interest, no matter what the rate<sup>8</sup>, and then prove for  
the principal.<sup>9</sup>

The general rule is subject to two exceptions. Exceptions  
to general  
rule.  
First, where there is a surplus of assets of the estate  
being administered<sup>10</sup>, proof may be made for interest  
subsequent to the date of the receiving order<sup>1</sup>.  
Secondly, a distinction is to be observed between inter-  
est running on a debt due before the date of the receiv-  
ing order, and interest on a debt payable after the  
date of the receiving order bearing interest in the  
interim. Interest in such last mentioned case may be  
proved for<sup>2</sup>.

*Greenwich Hotels Co.* (1892), 1 Ch. 639; *Bromley v. Goodere*, 1 Atk. 79; *Ex parte Badger*, 4 Ves. 165; in such cases it made no difference that the mortgage provided for the periodical payment of principal and interest by sums in which principal and interest were lumped together; for the substance of the transaction was looked at and it was immaterial whether or not the arithmetic was done on the face of the instrument; *Ex parte Bath in re Phillips* (1882), 22 Ch. D. 450, and see *In re Holland ex parte Parker & Young* (1894), 1 Mans. 509.

<sup>4</sup> *In re Pearce's Trusts* (No. 2) (1909). 2 Ch. 492, at 504; 78 L. J. Ch. 784; 16 Mans. 265.

<sup>5</sup> See where the security is valued *In re Savin* (1872), L. R. 7 Ch. 760.

<sup>6</sup> *Ex parte Lubbock* (1863), 4 DeG. J. & S. 516; *Quartermaine's Case In re London, Windsor and Greenwich Hotel Co.*, *supra*.

<sup>7</sup> *Ex parte Lubbock*, *supra*.

<sup>8</sup> For *The Bankruptcy Act* does not contain the equivalent of section 66(1) of the English Act of 1914.

<sup>9</sup> *In re Fox and Jacobs ex parte Discount Banking Co* (1893), 10 Mor. 295.

<sup>10</sup> See in the case of joint and separate estates notes to section 51(3).

<sup>1</sup> *Ex parte Bath in re Phillips* (1882), 22 Ch. D. 450; and see section 51(5).

<sup>2</sup> See *In re Browne and Wingrove ex parte Ador* (1891), 2 Q. B. 574; 61 L. J. Q. B. 15; 8 Mor. 264, and see notes to section 50.



## Section 50

*Debts Payable at a Future Time.*

Debts payable at a future time.

50. A creditor may prove for a debt not payable at the date of the receiving order or of the authorized assignment as if it were payable presently and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of six per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

**Cross References Act:** Debts provable, 44; Interest, 49; proof of debts, 45; proof by secured creditors, 46.

**Cross References Forms:** Proof of debts, 47, 48.

**Analogous Legislation:** English Act, 1914, Schedule II., Rule 22; Canadian Acts, 1875, s. 80; 1864, s. 5(2); *Ontario Assignments Act*, 1914, s. 26(5); *Manitoba Assignments Act*, 1913, s. 25.

Under this section and section 44, not only may proof be made for a debt payable at a future time, but a liability to pay interest in the future may also be valued and proved for. This modifies the rule in bankruptcy that there can be no proof for interest accruing subsequently to the date of the receiving order<sup>3</sup>.

The proper course in dealing with a debt payable at a future time, bearing interest in the meantime, is to be found in combining the rules and procedure laid down in sections 44 and 50. The debt should be proved as a present debt under section 44, and section 50 applied to the dividend payable on it. The liability to pay interest should also be proved, and a dividend paid on it without any rebate, for section 50 is confined to debts. If therefore the debt bears interest at six per cent., then the result will be the same as if the principal sum is treated as a present debt not bearing interest<sup>4</sup>. It has been suggested that if the interest contracted for is more than six per cent., it is possible

<sup>3</sup> See notes to section 49.

<sup>4</sup> *In re Broune & Wingrove ex parte Ador* (1891), 2 Q. B. 574; 61 L. J. Q. B. 15; 8 Mor. 264, in which the history of the law with respect to proof for interest accruing after adjudication is given.



that section 44 may not be invoked so as to allow Section 51 proof for the amount beyond the rebate<sup>5</sup>.

### *Priority of Claims.*

- 51 (1) Subject to the provisions of the next succeeding section as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority,—
- Firstly, The fees and expenses of the trustee;  
 Secondly, The costs of the execution creditor (including sheriff's fees and disbursements) coming within the provisions of section eleven, subsections one and ten;  
 Thirdly, All wages, salaries, commission or compensation of any clerk, servant, traveling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment, and all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act.
- (2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them.
- (3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of

<sup>5</sup> Per Lindley, L.J., *In re Brown & Wingrove ex parte Ador*, *supra*, at 582.



Section 51	the respective separate estates in proportion to the right and interest of each partner in the joint estate.
Equal payment.	(4) Subject to the provisions of this Act, all debts proved in the bankruptcy or under an assignment shall be paid <i>pari passu</i> .
Surplus.	(5) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order or assignment at the rate of six per cent. per annum on all debts proved in the bankruptcy or under the assignment.
Taxes.	(6) Nothing in this section shall interfere with the collection of any taxes; rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

**Cross References Act:** Restricted creditors, 48; ranking of claims where joint and separate estates, 28(2); proof in respect of distinct contracts, 47; limited partnerships, 76; property of partners to be vested in the same trustee, 69(3); partnerships generally, 69, 70; interest, 49; trustee not bound to accept duties unless sufficient for disbursements and remuneration, 15(5); remuneration and disbursements of trustee, 40; "costs, charges and expenses of proceedings," 38; costs of administration, 37(1); priority for rent where distrainable assets, 52; priority of repayment of obligations and advances when trustee carrying on business, 27; costs of execution creditor, 11(1)(10); property defined, 2(*dd*); debtor entitled to surplus, 38.

**Cross References Rules:** Costs of petitioning creditor, 55; costs out of joint and separate estate, 60; receiving order against a firm, 94; liability of limited partners, 95.

**Analogous Legislation:** Canadian Act, 1875, ss. 88, 91, 118; English Act, 1914, s. 33; *Dominion Winding-up Act*, 1906, ss. 70, 92; *Ontario Assignments Act*, 1914, s. 10; *The Wages Act*, R. S. O. 1914, c. 143, s. 3.

#### ANALYSIS OF NOTES.

Order of priority.

Taxes.

Fees and expenses of trustee and landlord's preferred claim for three months' rent.

Wages, salaries, commission or compensation.

Clerk, servant, travelling salesman, labourer or workman.



Wages a charge on security under *Bank Act*.

Where not legislated for by *Bankruptcy Act* local law determines priorities.

Section 51

Section 51(3) Administration in partnership cases.

Section 51(3) to be distinguished from section 47.

Case to which section applies.

Exception in the case of joint creditors.

What is joint and separate estate.

1. Estoppel.

2. Agreement among partners on dissolution.

3. Effect of dissolution by bankruptcy of one partner.

Partner may not compete with firm creditors.

Consolidation of estates.

Section 51 is not a conspicuously well-drafted or well-considered section. In addition to the ambiguities and obscurities of 51(1)(2), there is the fact that section 51(3), to a certain extent, covers the same ground as section 28(2).

The words "and all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act" were added by section 39 of *The Bankruptcy Act Amendment Act 1921*.

Where the trustee is not carrying on any business of the debtor<sup>6</sup>, it would seem that the assets<sup>7</sup> of the bankrupt are subject to distribution to satisfy claims in the following order of priority<sup>8</sup>.

1. Payment to the landlord of an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of the distress if any<sup>9</sup>.
2. The fees and expenses of the trustee.
3. The costs of the execution creditor.
4. Wages, salaries, commission or compensation, etc.

<sup>6</sup> Section 27.

<sup>7</sup> What are the assets will depend partly on the action of secured creditors and of the trustee with respect to property comprised in the secured creditors' security. See ss. 46 and 22(2).

<sup>8</sup> Where a debtor has obtained a discharge and has resumed business with the knowledge of his creditors and that of the trustee and has contracted debts and his discharge has been avoided, the subsequent creditors are entitled to be paid out of his assets in priority to the former creditors: *Buchanan v. Smith* (1870), 17 Gr. 208; 18 Gr. 41; for the avoidance of the discharge is at the option of the former creditors.

<sup>9</sup> Section 52(1).



## Section 51

## Taxes.

It may be that under the wording of some particular statute with respect to taxes the Crown, in right either of the Dominion or of the Province, will be a secured creditor with respect to the particular class of taxes covered by that statute; but in cases where no such question arises a difficulty is raised by the wording of subsection 51(6). It is submitted that were it not for that subsection the combined effect of sections 86 and 51(4) would be that the Crown so far as it is bound by section 86, would rank *pari passu* with other creditors. Section 51(6) is ambiguous, and does not necessarily cut down the combined effect of sections 86 and 51(4). It deals only with the "collection" of taxes and the rights of the Crown by way of lien or charge, and not necessarily with priorities of payment. The provisions of sections 7(9)(10) *The Income War Tax Act* 1917, c. 28, as amended by 1920, c. 49 (Dom.), should not be overlooked<sup>10</sup>.

Fees and expenses of trustee and landlord's preferred claim for three months' rent.

Section 51(2) appears to draw a distinction between the fees and expenses of the trustee and the costs of administration<sup>1</sup>. This distinction supports the conclusion that the phrase "the foregoing debts", which is used in section 51(2), refers not only to wages, salaries, commission or compensation, but also to the fees and

<sup>10</sup> These sections are quoted in the notes to section 37. See for a late case on the common law right of the Crown to priority of payment over creditors of the same class. *In re Laycock, Laycock v. Income Tax Commissioners* (1918-19), B. & C. R. 165; and for the right of the landlord to be subrogated to the remedies of the municipality for taxes which the tenant ought to have paid: *Boone v. Martin* (1920), 47 O. L. R. 205 (App. Div.).

<sup>1</sup> With the expression fees and expenses of the trustee compare sections 15(3) and 40. which speak of the remuneration and disbursements of the trustee, and see English Rule 117. which reads:—

Priority of costs and charges payable out of estate.

"The assets in every matter remaining, after payment of the actual expenses incurred in realising any of the assets of the debtor, shall, subject to any order of the court, be liable to the following payments, which shall be made in the following order of priority, namely:—

"First. The actual expenses incurred by the Official Receiver in protecting the property or assets of the debtor or any part thereof, and any expenses or outlay incurred by him or by his authority in carrying on the business of the debtor:

"Next. The fees, percentages and charges payable under Table B of the Scale of Fees; and any other fees payable to, or costs, charges and expenses incurred or authorized by, the Official Receiver;

"Next. The fee which, under the Scale of Fees for the time being in



expenses of the trustee and to the costs of the execution creditor. So to hold is to give a somewhat artificial meaning to the word debts; but unless this construction obtains, there will be difficulty in giving an interpretation to the word "debts" in section 52(1) which does not do an injustice to the landlord. It is considered that the object of section 52(1) is to cut down the landlord's right of distress, and to secure him to the extent only of the last three months' rent due; or to the extent of the distrainable assets, if they are of less value than that. It was hardly intended not only to deprive the landlord of his right of distress; but also to make the distrainable assets subject to all the fees and expenses of the trustee and the costs of the execution creditor<sup>2</sup>.

The landlord's claim for rent accruing due after the date of the receiving order, will be part of the expenses of the trustee; for section 52(3) provides that

force, is required to be affixed to the copy of the cash book when forwarded for audit;

"Next. The deposit or deposits lodged by the petitioning creditor pursuant to these Rules;

"Next. The deposit or deposits lodged on any application for the appointment of an Interim Receiver;

"Next. The remuneration of the special manager (if any);

"Next. The taxed costs of the petitioner;

"Next. The remuneration and charges of the person (if any) appointed to assist the debtor in the preparation of his statement of affairs;

"Next. Any allowance made to the debtor by the Official Receiver;

"Next. The taxed charges of any shorthand writer appointed by the court;

"Next. The trustees' necessary disbursements other than actual expenses of realization heretofore provided for;

"Next. The costs of any person properly employed by the trustee with the sanction of the committee of inspection;

"Next. Any allowance made to the debtor by the trustee with the sanction of the committee of inspection;

"Next. The remuneration of the trustee;

"Next. The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Board of Trade."

And see *In re Bright ex parte Wingfield & Blew* (1903), 1 K. B. 735; 72 L. J. K. B. 287; 10 Mans. 31. This rule gives priority to the taxed costs of the petitioner. It may be that Rule 55 with which English Rule 130 may be compared will be construed as giving to the petitioning creditor a right to have his costs paid out of the estate in priority to the unsecured creditors.

<sup>2</sup> See *per Orde, J., In re Auto Experts, Ltd., Ex parte Tanner* (1921), 19 O. W. N. 532; *Briggs v. Sowry* (1841), 8 M. & W. 729, 742; and *cf. Mason v. Hamilton* (1872), 22 U. C. C. P. 190, 411.



**Section 51** the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of the lease<sup>3</sup>. The fees and expenses of the trustee will not be paid in priority to the repayment of moneys advanced by a third party under an order of the court, making them (subject to existing liens, charges or encumbrances), a first charge on all the assets of the company<sup>4</sup>.

See as to the liability of a receiver and manager who, with notice of a preferential claim, exhausts the assets of the company in making payments to ordinary creditors, without first satisfying the preferential claim, *Woods v. Winskill*<sup>5</sup>.

Wages,  
salaries,  
commission  
or compensa-  
tion.

The expression "wages, salaries, commission or compensation" should be compared with the somewhat similar expression in section 48. The words in section 51(1), including as they do commission or compensation, in addition to wages and salary, are very wide. The previous cases on commission were collected and reviewed in *Re Parkin Elevator Co., Ltd., Dunsmoor's Claim*<sup>6</sup>. It has been held that a traveller's travelling expenses are as much part of his wages as the fixed sum<sup>7</sup>.

In the absence of proof of an agreement to that effect, the taking of a negotiable instrument for wages does not constitute payment of the debt so as to deprive servants of their priority<sup>8</sup>. The assignee of wage claims is entitled to the priority in payment

<sup>3</sup>And for this rental the trustee will be personally liable. See notes to section 52.

<sup>4</sup>*Keyes v. Hanington* (1913), 13 D. L. R. 139. Where liquidators have been authorized to complete a contract for the benefit of the estate and in so doing adopt a prior contract between company and sub-contractor for part of the work the sub-contractor's contract price is to be divided into two parts, the first with respect to work done prior to the liquidation ranking as an ordinary claim; the second with respect to work done thereafter being paid in full: *Bishop Construction Co., Ltd., Hains v. Garth* (1914), 15 D. L. R. 911.

<sup>5</sup>(1913), W. N. 212.

<sup>6</sup>(1916), 37 O. L. R. 277.

<sup>7</sup>*In re Morlock & Oline, Ltd.* (1911), 23 O. L. R. 165. As to a bonus see *Allner v. Lighter* (1913), 13 D. L. R. 210.

<sup>8</sup>*Armstrong v. Watson* (1919), 45 D. L. R. 501.



which the statute accords to these claims<sup>9</sup>. What is payable is the balance of the wages of the three months next before the date of the receiving order; not as under the Ontario Act the wages, not exceeding three months' wages<sup>10</sup>. Section 51

A winding-up order may in certain cases be notice of discharge to the servants of the company from the date of the order; as where the concern is hopelessly and irretrievably bankrupt, and there is nothing whatever for clerks to do; but if there be actual business to occupy the services of the clerks, they go on under the old contract<sup>1</sup>. Under *The Insolvent Act* of 1869, priority was only given to those in the employ of the insolvent, so that a clerk who had left his employ because he could not get his pay, lost his privilege<sup>2</sup>.

A director<sup>3</sup> is not a clerk, nor is the manager<sup>4</sup>, and *a fortiori*, the managing director of a company is not a "clerk or servant" of the company within the meaning of section 51(1)<sup>5</sup>. But a director may be a servant of the company in another capacity, and so entitled to priority in respect to wages so earned<sup>6</sup>, although where his services are mainly that of manager, and it is impossible to apportion his salary between the different services rendered, he will rank only as an ordinary creditor<sup>7</sup>. Under section 88 of 7 Edw. VII. c. 34,

<sup>9</sup> *Porterfields v. Hodgins* (1913), 29 O. L. R. 409; *affd.* 30 O. L. R. 651, and cases there cited; *In re Canadian Mineral Rubber Co.* (1916), 10 O. W. N. 456; 11 O. W. N. 135; contrast *Eastern Trust Co. v. Boston Richardson Mining Co.* (1908), 5 E. L. R. 558; *Olson v. Machin* (1912), 4 O. W. N. 287.

<sup>10</sup> *Ex parte Fox in re Smith* (1886), 17 Q. B. D. 4; 55 L. J. Q. B. 288; 3 Mor. 63. Receiving order for this purpose includes an order appointing an interim receiver; S. C. See *McLarty v. Todd* (1912), 4 O. W. N. 172.

<sup>1</sup> *In re English Joint Stock Bank* (1867), L. R. 3 Eq. 341, contrast *Chapman's Case*, L. R. 1 Eq. 346.

<sup>2</sup> *Ex parte Napier* (1875). 3 Pugs. 134.

<sup>3</sup> *In re Ritchie-Hearne Co.* (1905), 6 O. W. R. 474.

<sup>4</sup> *Girard v. Gariepy* (1916), 49 Q. S. C. R. 284; *In re Shirleys, Ltd.* (1916), 29 D. L. R. 273.

<sup>5</sup> *In re Newspaper Proprietary Syndicate, Ltd.* (1900), 2 Ch. 349; 69 L. J. Ch. 578; 8 Mans. 65.

<sup>6</sup> *In re Beeton & Co., Ltd.* (1913), 2 Ch. 279; 82 L. J. Ch. 464; 20 Mans. 222; *Armstrong v. Watson* (1919), 45 D. L. R. 501.

<sup>7</sup> *In re S. E. Walker Co., Ltd.* (1913), 25 W. L. R. 164; 12 D. L. R. 769. He is an ordinary creditor for an amount equal to three months' wages; but a restricted creditor for any wages exceeding that amount: sec. 48(3).



**Section 51** *The Ontario Companies Act*, which read "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting, "it has been held that a director cannot enforce a claim for payment of his services as a commercial traveller unless a by-law authorizing such payment has been confirmed at a general meeting<sup>8</sup>. A secretary of a company may be a clerk or servant of the company<sup>9</sup>, though a secretary who does not give his whole time to the service of the company and discharges the general duties of his office by a clerk appointed and paid by himself is not a clerk or servant of the company within the section<sup>10</sup>. It has been said that the priority given by the section was intended to apply to wages due in respect of personal services rendered by the clerk or servant<sup>1</sup>.

Where services are rendered for weekly wages and at definite hours, the employee may be a "servant", even though during part of his time he works elsewhere<sup>2</sup>. But contributors to a periodical are not clerks or servants of the company publishing the periodical, even though they may be paid in the main by salary<sup>3</sup>. On the other hand, where a person in a mine is required to work himself a stated number of hours each day, he may be a labourer or workman, even though he is paid by the amount of material he takes out<sup>4</sup>, and even though he has under him other men for whose wages he alone is responsible<sup>5</sup>. A foreman's position is that of workman and not of contractor, where, although he

<sup>8</sup> *In re Morlock & Cline, Ltd.* (1911), 23 O. L. R. 165; see previous *Fayne v. Langley, Lavender v. Langley* (1899), 31 O. R. 254.

<sup>9</sup> *Cairney v. Back* (1906) 2 K. B. 746; 75 L. J. K. B. 1014; 14 Mans. 58; see where though the claimant was the secretary the greater part of his services were rendered as salesman; *Re S. E. Walker Co., Ltd.* (1913), 25 W. L. R. 164; 12 D. L. R. 769.

<sup>10</sup> *Cairney v. Back*, *supra*.

<sup>1</sup> S. C.

<sup>2</sup> *In re Morison & Co., Ltd.* (1912), 106 L. T. 731. but see as to an auditor. *In re Ontario Forge and Bolt Co., Townsend's Case* (1896), 27 O. R. 230; and accountant, *Miquelon v. Vilandre* (1914), 16 D. L. R. 316.

<sup>3</sup> *In re Beeton Co., Ltd.* (1913), 2 Ch. 279; 82 L. J. C. Ch. 464; 20 Mans. 222.

<sup>4</sup> And *semble* such payment may be "wages": *In re Western Coal Co., Ltd.* (1913), 25 W. L. R. 26; 12 D. L. R. 401.

<sup>5</sup> *Ex parte Allsop in re Disney* (1875), 32 L. T. 433.



is paid so much per thousand bricks produced, he is engaged by the week, may be discharged at a week's notice, and is not allowed to select his workmen<sup>6</sup>; but a person may occupy a dual position, being both a foreman and an independent contractor<sup>7</sup>.

It has been held under *The Winding-up Act* that where a bank takes possession of the security mentioned in section 88 of the Bank Act, and the company goes into liquidation and the liquidator does not propose to take over the security, the bank, when it realizes its security, must treat the three months' wages of the employees as a charge on the proceeds of the security, and this independently of when they accrued, assuming that none are statute-barred. In such cases the general assets of the company will be relieved of any claims by employees for wages to the extent of what the employees receive from the bank<sup>8</sup>.

Where they are not expressly or impliedly modified by federal legislation, the priorities of creditors will be determined according to the provisions of the local law<sup>9</sup>. Thus the local law may determine the priority of the Crown<sup>10</sup>, or priorities *inter se* of privileged claims<sup>1</sup>, or, as was the case under *The Winding-up Act*, the rights of landlords<sup>2</sup>.

The present subsection 51(3) was enacted by *The Bankruptcy Act Amendment Act 1920*<sup>3</sup>. Section 28 (2),

<sup>6</sup> *In re Field* (1887), 4 Mor. 63.

<sup>7</sup> *Tam v. Robertson* (1902), 9 B. C. R. 505, where the plaintiff was a foreman at a salary of \$50 a month and had also contracted to supply labour and pack salmon at a stated price per case: i.e., by piece work. He had preference only for salary.

<sup>8</sup> *In re Alberta Ornamental Iron Co. and The Imperial Bank of Canada* (1917), 35 W. L. R. 126; 1 W. W. R. 126.

<sup>9</sup> See *Exchange Bank of Canada v. The Queen* (1885), 11 A. C. 157; *In re Fashion Shop Co.* (1915), 21 D. L. R. 479; *White Star Hotel Co. v. Turgeon* (1916), 17 Que. P. R. 299.

<sup>10</sup> *The Exchange Bank of Canada v. The Queen*, *supra*.

<sup>1</sup> *White Star Hotel Co. v. Turgeon*, *supra*. See section 63 as to the discretion of the court.

<sup>2</sup> *In re Fashion Shop Co.*, *supra*.

<sup>3</sup> The previous subsection read:

(3) In the case of partners the joint estate shall be applicable in Partners and the first instance in payment of their joint debts, and the separate estate separate of each partner shall be applicable in the first instance in payment of estates. his separate debts. If there is a surplus of the separate estate, it shall be dealt with as part of the respective separate estate in proportion to the right and interest of each partner in the joint estate.



Section 51  
 Sec. 51(3).  
 Administra-  
 tion in  
 partnership  
 cases.

which appears in the section devoted to set-off, to a certain extent covers the same ground as section 51(3). Section 28(2), however, is said to differ from 51(3) in that under 28(2) there is no room for enquiry whether there is joint estate as a test of the right of the separate creditor to priority upon the separate estate. The criterion is said to be the existence of joint and separate debts not joint and separate property, so that if there are separate debts they have the absolute preferential right to payment out of the separate estate, whether or not there be joint estate<sup>4</sup>. This differs from the rule under 51(3), for under that section joint creditors of a partnership may rank against the separate estate if there is no joint estate and no solvent partner<sup>5</sup>. It may possibly be argued, however, that if there is no joint estate, the joint claims cannot rank first on it as 28(2) requires.

The rule set out in 51(3) was laid down in 1728 by Lord King in *Ex parte Cook*<sup>6</sup> and embodied in 1794 in Lord Loughborough's order of 6th March<sup>7</sup>. A thorough discussion of the rule would require a consideration of the whole question of the administration in bankruptcy of partnership estate. Such a discussion is outside the scope of this work. Reference may be made to Lindley on Partnership, where the matter is fully treated. The following notes are no more than an introduction to the subject.

Sec. 51(3)  
 to be distin-  
 guished from  
 Sec. 47.

The section under discussion does not apply to a case where in the same instrument there is both a joint and several liability, as where a promissory note is signed by a partnership firm and also by the two members in their individual names. In such case the holder of the note has distinct claims both against the joint estate and against the separate estate<sup>8</sup>. Formerly a rule existed in bankruptcy whereby in such case he was put to his election as to which estate he wished to

<sup>4</sup> *In re Walker* (1881). 6 O. A. R. 169, 172.

<sup>5</sup> See *infra*.

<sup>6</sup> 2 P. Williams, 500.

<sup>7</sup> 1 Mont. & Ayr. 454.

<sup>8</sup> *Gordon v. Matthews* (1909), 18 O. L. R. 340, 344; 19 O. L. R. 564; in effect overruling *Frost & Wood Co. v. Stoddart* (1908), 12 O. W. R. 1133.



receive dividends from<sup>9</sup>. That rule has now been changed by section 47, and he may on distinct contracts such as those above mentioned rank and receive dividends from each estate<sup>10</sup>. Section 51

The principle laid down in the section is that a joint creditor is not entitled to rank against the separate estate, or a separate creditor against the joint estate until the separate or joint creditors as the case may be have been paid in full. This rule, which obtains in administration in bankruptcy and insolvency<sup>1</sup>, is different from the rule which is observed in other cases<sup>2</sup>. So strongly has the rule been administered, that an assignment of all the separate property of a debtor for the equal and ratable payment of all his individual creditors, and also all his partnership creditors, was set aside as giving an unfair preference to the partnership creditors who had no right to rank on the separate property until the separate creditors were paid in full<sup>3</sup>. A creditor whose proof is admitted against the separate estates of two bankrupts who have been partners, is not entitled to receive any dividend in respect of interest accrued on his debt subsequently to the date of the adjudication, until the joint creditors have been paid the principal of their debts in full<sup>4</sup>.

<sup>9</sup> *In re Chaffey* (1870), 30 U. C. Q. B. 64. The rule firmly established in England by *Goldsmid v. Cazenove*, 7 H. L. C. 785 was by the decision of the judicial committee of the Privy Council in *Rolfe v. Flower*, L. R. 7 P. C. 27, declared applicable to the colonies where the domestic insolvent law did not unequivocally exclude its operation. See *per Moss, J.A.*, *In re Wilson, Carter v. Woodruff* (1877), 2 O. A. R. 151.

<sup>10</sup> And see for similar result under the Act of 1875 *In re Wilson Carter v. Woodruff*, *supra*, distinguishing *In re Dodge* a Nova Scotia case reported in 8 U. C. L. J. N. S. 51. See where there was a contract by partners to invest money, and a liability of one partner as trustee, which is a liability arising out of contract, *In re Parkers ex parte Sheppard* (1887), 19 Q. B. D. 84; 56 L. J. Q. B. 338; 4 Mor. 135.

<sup>1</sup> *Martin v. Evans* (1884), 6 O. R. 238.

<sup>2</sup> See Pollock Digest of the Law of Partnership 9th ed., 1909, pp. 151 *et seq.* At law on a judgment against a firm both the property of the individual partners and the property of the firm is available to satisfy the execution: *Bank of Toronto v. Hall* (1884), 6 O. R. 653. The Creditors Relief Acts were not intended to alter this rule, but merely to abolish priority among execution creditors of the same class: *In re McDonagh v. Jephson* (1889), 16 O. A. R. 107.

<sup>3</sup> *Martin v. Evans*, *supra*.

<sup>4</sup> *Ex parte Findlay in re Collie* (1881), 17 Ch. D. 334; 50 L. J. Ch. 696.



**Section 51** Further, following the case of *Banco de Portugal v. Waddell*<sup>5</sup>, it has been held that where partners own and operate two separate businesses, one being called Gillespie Elevator Construction Company, the other Standard Coal Company, the partnership assets should be "pooled and wound up as a single partnership estate" for the joint creditors of each of the businesses were creditors of but the one firm<sup>6</sup>.

Exception in  
the case of  
joint  
creditors.

Certain exceptions have been developed to the rule that a joint creditor may not rank against the separate estate until the separate creditors have been paid in full; but these exceptions will have to be read subject to the effect to be given to section 28(2). Thus it has been held that a joint creditor may prove his debt in the first instance against the separate estate of a partner if the debt has been incurred by means of a fraud practiced on the creditor by the partners, or any of them<sup>7</sup>; or if there is no joint estate and no solvent partner<sup>8</sup>. Further, a joint creditor may present a petition against an individual partner and in that way may compete with the separate creditors in the receipt of dividends,<sup>9</sup> and a joint creditor may so petition on his joint debt, even though he has a separate debt of sufficient amount to enable him to use it as the basis for his petition<sup>10</sup>. And if the joint creditors pay the separate debts they will be permitted to prove and vote and receive dividends out of the separate estate<sup>1</sup>.

The question what is joint estate is one of fact, not depending on representations made by the firm,

<sup>5</sup> 5 A. C. 161.

<sup>6</sup> *In re Gillespie* (1913), 23 M. L. R. 5; 23 W. L. R. 45.

<sup>7</sup> *Ex parte Adamson in re Collie* (1878), 8 Ch. D. 807; 47 L. J. B. 103.

<sup>8</sup> *Ex parte Kensington* (1808), 14 Ves. 447; *In re Budgett Cooper v. Adams* (1894), 2 Ch. 557; 63 L. J. Ch. 817; 1 Man. 230. If there is any joint estate, no matter how small or inadequate, the joint debts cannot rank on the separate estate till the separate debts are paid: *Ex parte Kensington*, *supra*. See further *Ex parte Bradshaw*, 1 G. & J. 90; *Ex parte Sadler*, 15 Ves. 52; *Ex parte Peake*, 2 Rose 54; *Ex parte Geller*, 2 Mad. 262; *Ex parte Smith*, 2 Rose 63; *Ex parte Barclay*, 1 G. & J. 272. See in the case of co-debtors not partners: *Hoare v. The Oriental Bank Corporation* (1877), 2 A. C. 589, 599, and cases there cited.

<sup>9</sup> *Ex parte Ackerman* (1808), 14 Ves. 604.

<sup>10</sup> *Ex parte Burnett in re Blake* (1841), 2 M. D. & D. 357.

<sup>1</sup> *Ex parte Chandler* (1803), 9 Ves. 35, and see *Ex parte Taitt* (1809), 16 Ves. 193; *Ex parte Clarke* (1799), 4 Ves. 677.



for the bankrupts cannot, as against the joint creditors by representations or contracts, prevent their estate being distributed according to the law of bankruptcy<sup>2</sup>; but it has been held that representations that there is a partnership and that certain property is partnership property, will be sufficient to require the administration of that property as joint estate, even though it may work a hardship on the separate creditors of the person to whom the property actually belongs<sup>3</sup>. This doctrine does not infringe the rule that where property belongs in fact to a partnership of two, and there is only one ostensible partner, the doctrine of reputed ownership does not apply; for in such case the possession is quite consistent with the real title, and the court will not treat the property of the firm as that of the partner<sup>4</sup>.

Section 51

What is joint and separate estate.

(1) Estoppel.

If a partnership is dissolved and a *bona fide* agreement is come to between the partners to the effect that what was the partnership property shall become the property of him who continues the business and afterwards the firm or the continuing partner becomes bankrupt, that which was the partnership property cannot be distributed as the joint estate of the firm, but must be treated as the separate estate of the continuing partner<sup>5</sup>. But in order that property of the firm may have lost its character of joint estate by agreement between the partners, the agreement must have been made before the time to which the title of the trustee relates back; it must not be tainted with fraud; nor be still executory; nor leave the property

(2) Agreement among partners on dissolution.

<sup>2</sup> *In re Collie ex parte Manchester Bank* (1876), 3 Ch. D. 481; 45 L. J. Bank. 149. following *Ex parte Connell* (1838), 3 Dea 201; 3 M. & A. 581.

<sup>3</sup> *Ex parte Arbouin* (1846), DeG. 359; *Rowland v. Crankshaw* (1866), L. R. 1 Ch. 421; *Ex parte Hayman in re Pulsford* (1878), 8 Ch. D. 11; 47 L. J. Bank 54; *The Codville Georgeson Co. v. Smart* (1907), 15 O. L. R. 357.

<sup>4</sup> *Ex parte Hayman in re Pulsford* (1878), 8 Ch. D. 11; 47 L. J. Bank. 54; *Reynolds v. Bowley* (1867), L. R. 2 Q. B. 474; 36 L. J. Q. B. 247. Where there is in fact no partnership a representation by a stranger that he is a partner will not, it seems, prevent him proving against the estate of the debtor in competition with the persons to whom he made the representation: *Ex parte Sheen in re Wright* (1877), 6 Ch. D. 235.

<sup>5</sup> *Lindley on Partnership*, 5th ed., 1912, at p. 817, and cases there cited.



**Section 51** subject to the liens<sup>6</sup> of the partners for their own indemnity<sup>7</sup>. Where the joint property has thus become the separate property of one partner, his estate will be subject to the claims of both joint and separate creditors<sup>8</sup>; but not it seems where both separate and joint estate still exist controlled and administered by the partner who carries on the partnership business<sup>9</sup>.

(3) Effect of dissolution by bankruptcy of one partner.

An adjudication of bankruptcy against one partner acts as a dissolution of the partnership<sup>10</sup>, and the rule adopted by the courts is that the solvent partner shall have the administration and liquidation of the partnership assets<sup>1</sup>, unless he be unable to exercise them as would be the case if he were abroad, or mentally afflicted, or an infant<sup>2</sup>. In such cases the trustee in bankruptcy of the insolvent partner conducts the liquidation and holds the partnership assets in trust to do so<sup>3</sup>. If the solvent partner is appointed receiver and manager of the partnership estate, he will be required on application of the trustee in bankruptcy of the insolvent partner to give security, pass his accounts, furnish the trustees with proper accounts, allow them all reasonable access to the books<sup>4</sup>, and when the balances in his hands reach a certain amount pay them into court, or into a joint account at a bank with the trustee and himself<sup>5</sup>. The trustee is also entitled to participate in profits made by the use of partnership property after the dissolution<sup>6</sup>.

Partner may not compete with firm creditors.

There is a further rule which should be mentioned here, namely that a partner in a bankrupt firm is not allowed to prove as a creditor in competition with the

<sup>6</sup> *In re Walker* (1881), 6 O. A. R. 169.

<sup>7</sup> See Lindley, *supra* at p. 818.

<sup>8</sup> *Moorehouse v. Bostwick* (1885), 11 O. A. R. 76; *Macdonald v. Balfour* (1892), 20 O. A. R. 404.

<sup>9</sup> *In re Walker* (1881). 6 O. A. R. 169.

<sup>10</sup> *In re Beauchamp Bros ex parte Carr* (1896), 3 Mans. 207.

<sup>1</sup> S. C. The solvent partner has a right to get in and to insist on getting in the assets of the dissolved partnership and has even a right to use for that purpose the name of the trustee in the bankruptcy on giving him an indemnity: *In re and ex parte Owen* (1884), 13 Q. B. D. 113; 53 L. J. Q. B. 863; 1 Mor. 93.

<sup>2</sup> *In re Beauchamp Bros.*, *supra*.

<sup>3</sup> S. C.

<sup>4</sup> *Ex parte Stoveld* (1823), 1 Gl. & J. 303.

<sup>5</sup> *Collins v. Barker* (1893), 1 Ch. 578; 62 L. J. Ch. 316.

<sup>6</sup> *Crawshaw v. Collins* (1808), 15 Ves. 218, 229.



creditors of the firm. He can neither compete with the joint creditors against the joint estate<sup>7</sup>, nor rank as a separate creditor of his co-partner before the joint creditors are paid in full<sup>8</sup>. There are, however, three exceptions<sup>9</sup> to the rule first above stated: Section 51

1. Where the separate property of one partner has been fraudulently dealt with as the property of the firm<sup>10</sup>.

2. Where there are two distinct trades, carried on by the firm and by one or more of the members of it with distinct capitals<sup>1</sup>.

3. Where a partner has obtained his order of discharge or has been otherwise discharged from the joint debts and has afterwards become a creditor of the firm<sup>2</sup>.

Although the rule that a partner may not rank as a separate creditor of his co-partner before the joint creditors are paid in full benefits the separate creditors of the co-partner, it is not for their sake, but for the sake of the joint creditors of the partnership that the rule exists. Therefore if the ranking of a partner as a separate creditor of his co-partner will not injure the joint creditors of the partnership he may rank. Such a case occurs where apart from the claim of the partner there will be no surplus of the separate estate available for creditors of the joint estate; or where

<sup>7</sup> *Ex parte Sillitoe* (1824), 1 Gl. & J. 374, 382; *Ex parte Hargraves* (1788), 1 Cox 440; 11 Ves. 414; *Ex parte Butterfield* (1847), De Gex 570; *Ex parte Edmonds*, 4 DeG. F. & J. 488; *Ex parte Brown*, M. D. & D. 718; *Ex parte Gordon in re Dixon* (1873), L. R. 10 Ch. 160; L. R. 8 Ch. 555; 42 L. J. Bank. 41; *Nanson v. Gordon* (1876), 1 A. C. 195; 45 L. J. Bank. 89.

<sup>8</sup> *Ex parte Collinge*, 4 DeG. J. & S. 533; *Ex parte Carter*, 2 Gl. & J. 233; *Ex parte Robinson*, 4 D. & Ch. 499, but distinguish *Ex parte Todd*, DeG. 87, and see *Hall v. Lannin* (1879), 30 U. C. C. P. 204.

<sup>9</sup> Lindley on Partnership, 8th ed., 1912, p. 847.

<sup>10</sup> *Ex parte Sillitoe* (1824), 1 Gl. & J. 374, 382; *Ex parte Harris*, 1 Rose 437; *Ex parte Lodge in re Fendal* (1790), 1 Ves. 166; and see in the case of a liability created by the fraud of a co-partner: *Baker v. Dawbarn* (1872), 19 Gr. 113, and the converse case of fraudulent conversion of firm property by a partner; *Read v. Bailey* (1877), 3 A. C. 94; 47 L. J. Ch. 161.

<sup>1</sup> *Ex parte St. Barbe* (1805) 11 Ves. 413; *Ex parte Castel* (1826), 2 Gl. & J. 124; *Ex parte Cook*, Mont. 228; *Ex parte Kaye*, 9 Mor. 269; *Ex parte Maude* (1867), L. R. 2 Ch. 550; *Ex parte Thompson* (1834), 3 D. & C. 612.

<sup>2</sup> *Ex parte Smith*, 14 Q. B. D. 394; *Ex parte Atkins*, Buch. 479.



**Section 52** all the joint debts have been paid or have ceased to exist<sup>3</sup>.

Consolidation of estates.

The old bankruptcy rule was that where joint and separate estates are so blended together as to render it impossible to separate them the court will consolidate them; but not where the accounts can be kept distinct; and the estates are not inextricably blended when more than fifty per cent. of the whole estate is clearly separate assets<sup>4</sup>.

### *Rights of Landlord.*

Right of landlord to distrain or realize rent to cease, but priority accorded.

52 (1) Where the bankrupt or authorized assignor is a tenant having goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realize his rent by distress shall cease from and after the date of the receiving order or authorized assignment and the trustee shall be entitled to immediate possession of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any.

May prove for surplus.

(2) The landlord may prove as a general creditor for (i) all surplus rent accrued due at the date of said receiving order or assignment; and (ii) any accelerated rent to which he may be entitled under his lease,

<sup>3</sup> *Ex parte Topping* (1865), 34 L. J. Bank. 13; 4 De. J. & S. 551; *In re and ex parte Head* (1894), 1 Q. B. 638; 63 L. J. Q. B. 206; 1 Mans. 38; *In re Ruby, Trusts Corporation of Ontario v. Ruby* (1897), 24 O. A. R. 509.

<sup>4</sup> *In re Sydney Barker & Co.* (1914), 21 Mans. 238; *In re Bulwer ex parte Sheppard* (1833), M. & B. 415; 3 Dea. & C. 195.



not exceeding an amount equal to three Section 52  
months' rent.

- (3) Except as aforesaid the landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease. May not prove as creditor for rent for unexpired term.
- (4) The trustee shall be entitled to continue in occupation of the leased premises for so long as he shall require the premises for the purposes of the trust estate, and any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the trustee for the period of his occupation. The trustee may surrender possession at any time but if he shall occupy for three months or more beyond the date of the making of the receiving order or authorized assignment the landlord shall be entitled to receive three months' notice in writing of the trustee's intention to surrender possession or three months' rent in lieu thereof. After the trustee surrenders possession such of the landlord's rights as are based upon actual occupation by the trustee shall cease. Continued occupation of leased premises by trustee.
- (5) Notwithstanding the legal effect of any provision or stipulation in any lease, where a receiving order or authorized assignment has been made, the trustee may at any time while he is in occupation of leased premises for the purposes of the trust estate and before he has given notice of intention to surrender possession, or disclaimed, elect to retain the leased premises for the whole or any portion of the unexpired term, and he may, upon payment to the landlord of all Trustee may elect to retain leased premises and on payment of overdue rent may assign lease.



### Section 52

Security to  
be given by  
assignee of  
leased  
premises.

Trustee may  
disclaim  
lease.

Liability  
if he elects  
to retain  
and assign  
premises.

overdue rent, assign the lease to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or more hazardous nature than that which was thereon conducted by the debtor, and who shall on application of the trustee be approved by the court as a person fit and proper to be put in possession of the leased premises. Provided, however, that before the person to whom the lease shall be assigned shall be permitted to go into occupation he shall deposit with the landlord a sum equal to six months' rent or supply to him a guarantee bond approved by the court in a penal sum equal to six months' rent, as security to the landlord that such person will observe and perform the terms of the lease and the covenants made by him with respect to his occupation of such premises.

- (6) The trustee shall have the further right, at any time before giving notice of intention to surrender possession, and before becoming under obligation to give such notice in case of intention on his part to surrender possession, to disclaim any such lease, and his entry into possession of the leased premises and their occupation by him while required for the purposes of the trust estate shall not be deemed to be evidence of an intention on his part to elect to retain the premises nor affect his right to disclaim or to surrender possession pursuant to the provisions of this section; and if after occupation of the leased premises he shall elect to retain them and shall thereafter assign the lease to a person approved by the court as by subsection five hereof provided, the liability of the trustee, whether personal or as



trustee and whether arising out of privity of contract or of estate and as well all liability of the estate of the debtor shall, subject to the provisions of subsection one hereof, be limited and confined to the payment of rent for the period of time during which the trustee shall remain in possession of the leased premises for the purposes of the trust estate. Section 52

- (7) Where the bankrupt or authorized assignor, being a lessee, has, before the making of the receiving order or authorized assignment, demised by way of underlease any premises and the trustee disclaims or elects to assign the lease, the court may, upon the application of such underlessee, make an order vesting in the underlessee an equivalent interest in the property, the subject of the demise to him, to that held by him as underlessee of the debtor, but subject, except as to rental payable, to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the making of the receiving order or authorized assignment, performance to be secured as and pursuant to the same conditions as provided by subsection five of this section in case of an assignment of lease made by the trustee. The underlessee shall in such event be required to covenant to pay to the landlord a rental not less than that payable by the underlessee to the debtor and if such last mentioned rental was greater than that payable by the debtor to the landlord the underlessee shall be required to covenant to pay to the landlord the like greater rental. The provisions of said subsection five shall be read subject to these provisions so that an underlessee, if he so desires, may have prior opportunity to acquire the right to the possession, for any unexpired term, of the
- Underlease  
by bankrupt  
or assignor,  
if disclaimed  
or assigned,  
by trustee  
may be  
vested in  
underlessee  
of debtor.
- Rental  
payable.



## Section 52

Prior rights  
of under-  
lessee.

premises occupied or held by him of the debtor, and further, if it shall seem to the court most desirable in the interest of the debtor's estate, and notwithstanding the foregoing provisions of this subsection, a prior opportunity to acquire, pursuant to subsection five hereof, an assignment of the head lease.

**Cross References Act:** Remedies against the property of the debtor, 6(1), 7; priority of claims, 51; proof of debts, 45; permission of inspectors to elect, assign, disclaim, 20(1) (4).

**Cross References Forms:** Notice of election to retain leasehold property, 49; notice of disclaimer of lease, 50.

**Analogous Legislation:** Canadian Act, 1875, s. 74; and see 70-73; English Act, 1914, ss. 33(4), 35, 54; Schedule II., Rule 20; *Ontario Landlord and Tenant Act*, R. S. O. 1914, c. 155, s. 38.

## ANALYSIS OF NOTES.

Policy of section 52(1).

History of legislation.

Local law governs unless overborne.

Rights the landlord is deprived of.

Cases to which the section does not apply.

Rights given to landlord by, 52(1).

Future rent.

Secs. 52(4) (5) (6) (7).

52(4) Accelerated rent.

Proof for damages against overholding tenant.

52(5) Lease voidable at option of landlord.

Lease vests in trustee who becomes personally liable.

52(5) Deals with leases containing forfeiture clauses.

Liability of tenant who elects to retain premises.

Sections 52(4)(5)(6)(7) are in the form in which they were enacted by sections 40 to 43 inclusive of *The Bankruptcy Act Amendment Act 1921*<sup>5</sup>.

<sup>5</sup> The previous sections read:

52(4). In case of continued occupation by the trustee of the leased premises for the purposes of the trust estate any payment of accelerated rent made to the landlord shall be credited to the occupation of the trustee.

(5) Notwithstanding any provision or stipulation in any lease or agreement, where a receiving order or an authorized assignment has been made, the trustee may within one month from the date of any such receiving order or assignment, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agree-



The policy of section 52(1) is no doubt the same as Section 52  
 that of similar legislation in other countries, namely Policy of  
 to place limitations upon the exceptional remedy of Sec. 52(1).  
 the landlord when it comes into competition with the  
 interests of the general body of creditors, but not when  
 it comes into competition with the right of a third  
 party whose goods are upon the premises<sup>6</sup>. Such a  
 case would be that of a chattel mortgagee<sup>7</sup>, where the  
 amount payable under the chattel mortgage exceeds  
 the value of the goods<sup>8</sup>. The section is not applied in  
 such a case; for the only person to benefit would be  
 the chattel mortgagee<sup>9</sup>.

The history of bankruptcy legislation in England History of  
 with respect to the special right of the landlord is legislation.  
 given in *Wilson v. Wallani*<sup>10</sup>. The general effect which  
 bankruptcy has on the relationship between lessor and  
 lessee is fully treated in the leading books on Landlord  
 and Tenant.

The rights of the landlord being a matter of pro- Local law  
 perty and civil rights, will necessarily be determined governs  
 by the local law so far as it is not changed by valid unless  
 Dominion legislation<sup>11</sup>. Under English law, apart from or borne.

ment, or he may disclaim the lease or agreement. Should the trustee  
 not give such notice within the time hereinbefore provided, he shall be  
 deemed to have disclaimed the lease or agreement.

(6) If the trustee so elects to retain such premises for such unex-  
 pired term or portion thereof and the provisions of the lease do not  
 preclude the lessee from assigning the term or subletting the premises  
 the trustee shall have power to assign or sublet for the unexpired term.

(7) The entry into possession of the premises by the trustee during  
 the said period of one month shall not be deemed to be evidence of an  
 intention on the part of the trustee to elect to retain the premises nor  
 affect his right to disclaim the lease or agreement.

<sup>6</sup> *Railton v. Wood* (1890), 15 A. C. 363.

<sup>7</sup> *Alderson v. Watson* (No. 2) (1916), 36 O. L. R. 502.

<sup>8</sup> *Brocklehurst v. Lawe* (1857), 26 L. J. Q. B. 107; 7 E. & B. 176;  
 3 Jur. N. S. 436; *New City Constitutional Club ex parte Purssell*  
 (1887), 34 Ch. D. 646; and see *infra*, p. 480.

<sup>9</sup> *Brocklehurst v. Lawe*, *supra*.

<sup>10</sup> (1880), 5 Ex. D. 155.

<sup>11</sup> This section affords a further illustration of the manner in which  
*The Bankruptcy Act* and analogous federal legislation is superimposed on  
 local law. The Act for example nowhere defines what is meant by  
 distress, or the circumstances under which that right originates. Such  
 matters are assumed as part of the local legal substratum which may be  
 different in each of the provinces. The *lex loci contractus* will govern  
 unless altered by *The Bankruptcy Act*. See *In re Harte and Ontario*  
*Express Co.* (1892) 22 O. R. 510, which was the case of a claim in a  
 winding up in Ontario under the *Dominion Winding-up Act* based on a  
 lease executed in the Province of Quebec.



**Section 52** statute, a landlord is not a secured creditor by reason of the fact that he has a right to distrain<sup>12</sup>. In Quebec as in Scotland<sup>13</sup>, the law is different. In Quebec the landlord is under certain circumstances by reason of Art. 2005 of the Civil Code<sup>1</sup>, a secured creditor for rent that is due and to become due under a lease in authentic form<sup>2</sup>. It has been held under *The Winding-Up Act* that the claim of the lessor in Quebec is privileged before that of clerks on the proceeds of the sale of the movable effects found on the premises; but his privilege does not extend to moneys in the hands of the liquidator which have been paid by the government as indemnity for the refusal of the renewal of a liquor license.<sup>3</sup>

The changes made in the law by section 52(1) can be considered from two aspects; first of what rights the landlord is deprived; secondly, what rights are given to the landlord in substitution for those that he has lost.

Section 52(1) purports to deprive a landlord<sup>4</sup> from and after the date of the receiving order or authorized

Rights the  
landlord is  
deprived of.

<sup>12</sup> *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, 257; 50 L. J. Ch. 544.

<sup>13</sup> In Scotland the landlord has a "real security without possession" in respect of rent which has not yet accrued due: *In re Wanzer, Ltd.* (1891), 60 L. J. Ch. 492, 495.

<sup>1</sup> 2005. The privilege of the lessor extends to all rent that is due or to become due under a lease in authentic form. But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors the lessor's privilege is restricted to twelve months' rent due and the rent to become due during the current year if there remain more than four months to complete the year; if there remain less than four months to complete the year to the twelve months' rent due and to the rent of the current year and the whole of the following year. If the lease be not in authentic form the privilege can only be claimed for three overdue instalments and for the remainder of the current year.

<sup>2</sup> See further Mitchell Canadian Commercial Corporations, 1916, pp. 1538-40.

<sup>3</sup> *White Star Hotel Co., Ltd. v. Turgeon* (1917), 17 Que. P. R. 299.

<sup>4</sup> Where in a mortgage there is a demise between the mortgagee and the mortgagor so as to create the relation of landlord and tenant: *Hobbs v. Ontario Loan and Debenture Co.* (1890), 18 S. C. R. 483, the section will, no doubt, apply: *Munro v. Commercial Building and Investment Society* (1875), 36 U. C. Q. B. 464; cf. *In re Brown Bayley & Dixon* (1881), 18 Ch. D. 649. See *The Mortgages Act*, R. S. O. 1914, c. 112, s. 14, which in certain cases limits the right to distrain to distress for one year's arrears of interest or rent. See in other cases *Re Birmingham Gas Co.*, 24 L. T. N. S. 639.



assignment, of (1) his right to distrain on the goods of the debtor who is his tenant, (2) his right to possession of and apparently his right to dispose of, those goods for rent then due<sup>5</sup>. Section 52

There are cases to which the section does not apply.

(1) The landlord may distrain on the goods of a stranger found on the premises when the insolvent is the tenant<sup>6</sup>. Cases to which the section does not apply.

(2) The landlord may distrain on the goods of the insolvent found on the premises when a stranger is the tenant<sup>7</sup>.

(3) It may be that 52(1) will be read as not depriving the landlord of his right of distress for rent accruing due after the date of the receiving order or authorized assignment<sup>8</sup>.

(4) The section does not by express words apply to the privilege of a landlord given by the Civil Code.

(5) It was held under *The Winding-Up Act* that the preferential lien given by *The Ontario Landlord and Tenant Act*<sup>9</sup> in case of an assignment for the general benefit of creditors might make a creditor a secured creditor in winding-up proceedings where there had been such assignment<sup>10</sup>. But section 9 of *The*

<sup>5</sup> Under *The Winding-up Act* a landlord who has levied distress previous to the commencement of the winding up may it appears realize on the same: *In re Shirley's, Ltd.* (1916), 29 D. L. R. 273; *E. C. Colwell Candy Co.* (1902), 35 N. B. R. 613, *contra Fuches v. Hamilton Tribune*. It was also held in *McEdwards v. McLean* (1878), 43 U. C. Q. B. 454, that where a landlord had distrained before assignment the assignee was not entitled to possession of the goods unless he paid or tendered the rent then due; and that not having done so the landlord was entitled to proceed with the distress and realize by sale the rent due; and compare *per Moss, C.J.O., In re McCracken* (1879), 4 O. A. R. 486. See *infra*, p. 484. n. 3.

<sup>6</sup> *Railton v. Wood* (1890), 15 A. C. 363, and see *per* Burton, J.A., *In re McCracken, supra*.

<sup>7</sup> *In re Eshall Coal Mining Co.* (1864), 4 DeG. J. & S. 377; *Re Carriage Co-operative Supply Assoc.* (1883), 23 Ch. D. 154; *In re Lundy Granite Co. ex parte Heaven* (1871), L. R. 6 Ch. 462; *In re Regent United Service Stores* (1878), 8 Ch. D. 616, and see *In re Oak Pits Colliery Co.* (1882) 21 Ch. D. 322.

<sup>8</sup> *Cf. Ex parte Heaven in re Lundy Granite Co.* (1871), L. R. 6 Ch. 462; *Briggs v. Sowry* (1841), 8 M. & W. 729; 11 L. J. Ex. 193.

<sup>9</sup> R. S. O. 1914, c. 155, s. 38.

<sup>10</sup> *In re Fashion Shop Co.* (1915), 33 O. L. R. 253; 21 D. L. R. 478; citing *Lazier v. Henderson* (1898), 29 O. R. 673 and *Tew v. Toronto Savings and Loan Co.* (1898), 30 O. R. 76; *In re Clinton Thresher Co.* (1910), 15 O. W. R. 318; 1 O. W. N. 445; *Fuches v. Hamilton Tribune Co.* (1884), 10 P. R. 409.



**Section 52** *Bankruptcy Act* purports to make null and void every assignment of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors.

(6) The limitation of the landlord's rights is for the general benefit of creditors, and in cases where such limitation, while depriving the landlord of his rights, will not benefit the creditors, but will benefit a third party, such as a secured creditor, the landlord may distrain<sup>1</sup>.

Rights given  
to landlord  
by 52(1).

In place of his remedy of distress, the section directs the trustee to pay to the landlord in priority to all other debts an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of the distress, if any. The right to priority given by section 52(1)<sup>a</sup> exists whether or not distraint has been made<sup>2</sup>, provided there were goods or chattels available for distress at the date of the receiving order or authorized assignment. Where there is nothing on which a landlord can distrain, or where he has lost his right of distress, he is in no different position from other creditors<sup>3</sup>. What is meant by the phrase "in priority to all other debts" has yet to be determined. It has been suggested in the notes to section 51 that the phrase means in priority to the fees and expenses of the trustee, the costs of the execution creditor and wages, salaries, commission and compensation<sup>4</sup>. The Act is obscure in defining priorities, but so far as they are

<sup>1</sup> As for example where goods have been mortgaged to debenture holders in an amount greater than their value: *New City Constitutional Club ex parte Purssell* (1887), 34 Ch. D. 646; *Railton v. Wood* (1890), 15 A. C. 363; *Alderson v. Watson* (No. 2) (1916), 36 O. L. R. 502; *Brocklehurst v. Lawe* (1857), 26 L. J. Q. B. 107; 7 E. & B. 176; 3 Jur. N. S. 436. The fact that the debenture holders offer to release their security and stand as general creditors appears to be immaterial: *New City Constitutional Club ex parte Purssell*, *supra*, and see *supra*, p. 477.

<sup>2</sup> *In re Hoskins and Hawtry* (1877), 1 O. A. R. 379; *Lazier v. Henderson* (1898), 29 O. R. 673.

<sup>3</sup> *Ex parte Descharmes* (1742), 1 Atk. 103; *Anon.* (1740), 1 Atk. 102; *Bagge v. Mawby* (1853), 8 Ex. 641; *In re Kennedy, Mason v. Higgins* (1875), 36 U. C. Q. B. 471.

<sup>4</sup> This is the correct interpretation. See *per Orde, J., In re Auto Experts, Ltd. ex parte Tanner* (1921), 19 O. W. N. 532.



defined there is no room for the doctrine that the priorities of creditors will be determined according to the provisions of the local law<sup>5</sup>. Section 52

Under *The Bankruptcy Act* the landlord of a bankrupt tenant is, generally speaking, in a less favourable position than he was under the various Provincial assignments acts, or than he is under *The Winding-Up Act*<sup>6</sup>. In one respect, however, he is in a better position. It was held in *Miller v. Tew*<sup>7</sup> under the Ontario *Landlord and Tenants Act*, which restricted the preferential lien of the landlord in the case of an assignment for the benefit of creditors to one year's arrears of rent, but did not deprive him of his right of distress, that where the goods were destroyed by fire subsequently to the assignment, the landlord had no lien on the proceeds of the fire insurance, nor was he a preferred creditor. It is considered that under the wording of section 52(1), the landlord would be entitled to payment in such case out of the proceeds of the fire insurance.

It is possible that the rent to which priority is given is a sum equal to the last three months' rent, whether or not that sum is represented by a balance due on the rent of more than three months<sup>8</sup>. Section 34 of *The Bankruptcy Act* of 1869 gave a right of distress "only for one year's rent accrued due prior to the date of the order of adjudication." It was said that the meaning of that section was that if a landlord had been so weak as to allow his tenant to get into arrear with his rent for more than a year he could, in the event of the tenant's bankruptcy, only prove as an ordinary creditor for the arrears beyond the year<sup>9</sup>.

The landlord may not prove for future rent, but he Future rent.

<sup>5</sup> See *Exchange Bank of Canada v. The Queen* (1885), 11 A. C. 157; cf. *in re Fashion Shop Co.* (1915), 33 O. L. R. 253; 21 D. L. R. 478; *White Star Hotel v. Turgeon* (1916), 17 Que. P. R. 299.

<sup>6</sup> See *The Winding-up Act*, sections 23, 84.

<sup>7</sup> (1909), 20 O. L. R. 77.

<sup>8</sup> Cf. *McLarty v. Todd* (1912), 4 O. W. N. 172 on 10 Edw. VII. c. 72, s. 3 (Ont.).

<sup>9</sup> *Ex parte Hale in re Binns* (1875), 1 Ch. D. 285; 45 L. J. Bank.



**Section 52** has a claim against the trustee for rental during the period that the premises are occupied by him<sup>10</sup>.

**Accelerated rent.** *Semble*, the words "three months' rent accrued due" in section 52(1), may include rent which has become due during the term by reason of the operation of an acceleration clause<sup>1</sup>. As to whether an acceleration clause dependent upon the bankruptcy of the lessee is void as contrary to the spirit of the bankruptcy laws, see *Alderson v. Watson* (No. 1)<sup>2</sup>. A provision that the current year's rent is to become due and payable and the term forfeited "in case any writ or warrant of execution shall be issued against the goods" of the lessee is personal to the original lessor and lessee and does not run with the land<sup>3</sup>.

**Sec. 52(4) (5) (6) (7).** Sections 52(4)(5)(6)(7) require amendment. As they are not in final form it is not proposed to annotate them fully. The practitioners will find a comparison of these sections with section 54 of the *English Act* (1914) 4 & 5 Geo. V. c. 59, as annotated in any of the standard English books on Bankruptcy, of value.

**Sec. 52(4).** Section 52(4) with respect to the crediting payments of accelerated rent, appears to have been inserted with the view of giving statutory expression to the decision in *Kennedy v. Macdonell*<sup>4</sup>. As to what is meant by surrender in section 52(4) *quære*. See notes to section 52(5).

It has yet to be decided whether a claim for dam-

<sup>10</sup> Section 52(3). The trustee is personally liable for this rental. *per Orde, J., In re Auto Experts, Ltd. ex parte Tanner* (1921), 19 O. W. N. 532.

<sup>1</sup> *Alderson v. Watson* (No. 1) (1915), 35 O. L. R. 564; compare section 51(4) and see *Linton v. Imperial Hotel Co.* (1889), 16 O. A. R. 337; *Langly v. Meir* (1898), 25 O. A. R. 372; *Lazier v. Henderson* (1898), 29 O. R. 673; *Tew v. The Toronto Savings and Loan Co.* (1898), 30 O. R. 76; *Graham v. Lang* (1886), 10 O. R. 248; *Griffith v. Brown* (1870), 21 U. C. C. P. 12; *Shackell v. Charlton* (1895), 1 Ch. 378.

<sup>2</sup> (1915), 35 O. L. R. 564; *In re Hoskins and Hawtry* (1877), 1 O. A. R. 379; *Linton v. Imperial Hotel Co.* (1889), 16 O. A. R. 337. As to a fraudulent preference see section 31.

<sup>3</sup> *Mitchell v. McCauley* (1892), 20 O. A. R. 272. Osler, J.A., dissented on the ground that the covenant was not a separate and independent condition, but was to be read in connection with the covenant for the payment of the rent. It seems that a condition that the term is to be divested on bankruptcy concerns the things demised and runs with the land. *S. C. per MacLennan, J.A.*, at 279; *Stevens v. Copp* (1868), 4 Ex. 20, 24.

<sup>4</sup> (1901) 1 O. L. R. 250.



ages against an overholding tenant for double the yearly value of the land under 4 Geo. II. c. 28, s. 1, is a provable debt under section 44(1)<sup>5</sup>.

Where a lease contains a proviso or condition that on breach of any of the covenants the lease shall cease, determine and be utterly void to all intents and purposes whatsoever, such words will be construed to mean void at the election of the lessor<sup>6</sup>, and this is so even though the proviso be that the lease shall determine if the lessee should become bankrupt or insolvent. In such case if the landlord does not elect to forfeit the lease he may prove<sup>7</sup>.

Apart from the terms of 52(5), a proviso forfeiting the term on the bankruptcy of the lessor is valid and will be given effect to<sup>8</sup>.

Subject to section 52(5) and to the right of the trustee in certain cases to refuse to accept the lease, the effect of sections 6(3) and 10, is to vest the bankrupt's leasehold properties in the trustee who becomes personally liable on the covenants, not only to pay rent<sup>9</sup> in advance, if the lease calls therefor<sup>10</sup>, but also on the other covenants as well<sup>11</sup>.

<sup>5</sup> See *Magann v. Ferguson* (1895), 29 O. R. 235.

<sup>6</sup> *Roberts v. Davey*, 4 B. & Ald. 667.

<sup>7</sup> *Ex parte Leather Sellers Co. in re Tickle* (1886), 3 Mor. 126.

<sup>8</sup> *Kerr v. Hastings* (1875), 25 U. C. C. P. 429. A proviso for re-entry if "the lessee, his executors, administrators or assigns should become bankrupt," has reference only to the bankruptcy of the person for the time being possessed of the term: *Smith v. Gronow* (1891), 2 Q. B. 394; 60 L. J. Q. B. 776.

<sup>9</sup> *Semble*, the liability of the trustee is personal, though he is entitled to indemnity out of the assets: *Wilson v. Wallani* (1880), 5 Ex. D. 155; 49 L. J. Ex. 437; *Titterton v. Cooper* (1881), 9 Q. B. D. 473; 51 L. J. Q. B. 472; *Lazier v. Armstrong* (1905), 5 O. W. R. 596; *Kennedy v. Macdonald*, 1 O. L. R. 254; *Ex parte Dressler in re Solomon* (1878), 9 Ch. D. 252; 48 L. J. Bank. 20; *Ex parte Carter in re Ware* (1878), 8 Ch. D. 731. Where the trustee elects to retain the lease and so becomes liable for the rent for the rest of the term the lessor cannot recover for use and occupation, but is confined to his right to rent under the terms of the lease: *Lazier v. Armstrong*, *supra*.

<sup>10</sup> *Ex parte Hale in re Binns* (1875), 1 Ch. D. 285; 45 L. J. Bank. 21.

<sup>11</sup> *In re Levi & Co., Ltd.* (1919), 1 Ch. D. 416; 88 L. J. Ch. 233, following *In re Brown, Bayley & Dixon* (1881), 18 Ch. D. 649; *In re Silkstone and Dodworth Iron Co.* (1881), 17 Ch. D. 158. Where the lease contains a covenant not to assign without leave an assignment by the authorized trustee without leave is a breach of the covenant and a forfeiture: *Magee v. Rankin* (1869), 29 U. C. Q. B. 257; *Lazier v. Armstrong* (1905), 5 O. W. R. 596.

Section 52

Proof for damages against overholding tenant.

Sec. 52(5).

Lease voidable at option of landlord.

Lease vests in trustee who becomes personally liable.



## Section 52

Under the English *Apportionment Act* of 1870, the trustee who has accepted a lease is liable for the portion of the rent accruing due from the date of the receiving order down to the time when he assigns it over or disclaims it or the term ends<sup>2</sup>. Following the analogy of cases on section 163 of *The Companies Act* 1862, c. 89, it may be that the landlord can distrain for rent accruing due after the receiving order or assignment<sup>3</sup>.

52(5) deals with leases containing forfeiture clauses.

Although the question is not beyond doubt, the words "notwithstanding the legal effect of any provision or stipulation in any lease" in section 52(5) appear to apply only to leases containing provisions or stipulations forfeiting the lease in the event of a receiving order or authorized assignment being made.

Liability of tenant who elects to retain premises.

Where there has been an election to retain the premises under section 52(5) or generally<sup>4</sup>, the trustee will remain tenant within the terms of the lease until he assigns or makes a surrender at law. If he goes out of possession, returns the key to the landlord's agent and declares he will pay no more rent, he will not thereby put an end to the term for that is no surrender<sup>5</sup>. But he might destroy the privity of estate and rid himself of his liability by assigning the lease to a pauper<sup>6</sup>. Should the trustee before the discharge of the bankrupt assign the lease to a pauper and no rent

<sup>2</sup> *Swansea Bank v. Thomas* (1879), 4 Ex. D. 94; 48 L. J. Ex. 344; *Hopkinson v. Lovering* (1883), 11 Q. B. D. 92; *In re Wilson ex parte Lord Hastings* (1893), 62 L. J. Q. B. 628; 10 Mor. 219; *Bishop of Rochester v. Le Fanu* (1906), 2 Ch. 513; *In re Howell ex parte Mandelberg & Co.* (1895), 1 Q. B. 844; 64 L. J. Q. B. 454; 2 Mans. 192, and see R. S. O. 1914, c. 156, *The Apportionment Act*.

<sup>3</sup> See *Ex parte Heaven In re Lundy Granite Co.* (1871), L. R. 6 Ch. 462. The cases on distress with respect to rent in arrear before the commencement of the winding up and after are discussed and classified in *Re Oak Pits Colliery Co.* (1887), 21 Ch. D. 322. See, however, sections 7 and 13A and note 5, p. 479.

<sup>4</sup> *Semble* the provisions of 52(5) with respect to election to retain will be strictly construed and must be strictly complied with if there is to be a valid election to retain the premises. See as to notice under the English practice: *Wilson v. Wallani* (1880), 5 Ex. D. 155; 49 L. J. Ex. 437.

<sup>5</sup> *Connolly v. Coon* (1896), 23 O. A. R. 37. Contrast *Gold v. Ross* (1903), 10 B. C. R. 80. See as to the necessity of surrender by the debtor under the old statutes: *Tuck v. Fyson* (1829), 6 Bing. 321; *Briggs v. Sowry* (1841), 8 M. & W. 729.

<sup>6</sup> *Magill v. Young* (1848), 10 U. C. Q. B. 301; *Hopkinson v. Lovering* (1883), 11 Q. B. D. 92.



is thereafter paid, the lessor has a right of action Section 53  
against the bankrupt for breach of covenant to pay  
rent. This it would seem is a provable debt within the  
meaning of section 44<sup>7</sup>.

As a general principle in bankruptcy a trustee Sec. 52 (6)  
need not accept a *damnosa haereditas*<sup>8</sup>.

In England when an assignment is made by a  
debtor for the benefit of his creditors and subsequently  
a trustee in bankruptcy is appointed who disclaims the  
lease, the assignee is liable for the rent between the  
assignment of the lease and the date of the adjudica-  
tion in bankruptcy<sup>9</sup>. On disclaimer by the trustee, the  
landlord will be able to prove against the estate for  
damages for breach<sup>10</sup>.

### Disallowance of Claims.

53 (1) The trustee shall examine every proof Disallowance  
of claims.  
and the grounds of the debt, and may re-  
quire further evidence in support of it. If

<sup>7</sup>See *In re Sneezum ex parte Davis* (1876), 3 Ch. D. 463; *Wilson v. Wallani* (1880), 5 Ex. D. 155; 49 L. J. Ex. 437; *Magill v. Young* (1848), 10 U. C. Q. B. 301, and *cf. Newton v. Scott* (1842), 9 M. & W. 434; 10 M. & W. 471; *Phillips v. Sherville* (1845), 6 Q. B. 944; 9 Jur. 179.

<sup>8</sup>See as to the difference in this respect between trustees in bankruptcy and executors *Wilkins v. Fry* (1816), 1 Mer. 244, 265; 15 R. R. 110; and see *Levi v. Ayers* (1878), 3 A. C. 842; 47 L. J. P. C. 83. In cases to which s. 52(5) does not apply, there may be a distinction between the rights of a trustee to his claim under an authorized assignment and under a receiving order. See *per Duff, J.*, in *North-West Theatre Co. v. MacKinnon* (1916), 52 S. C. R. 589, 599. Where a debtor executed a deed for the benefit of his creditors and the assignee also executed it and acted under it, a lease not mentioned in the deed was held to have passed to the assignee so as to make him liable for rent though he had done no act specifically accepting it: *White v. Hunt* (1870), L. R. 6 Ex. 32; *Magee v. Rankin* (1869), 29 U. C. Q. B. 257. Where a trustee entered into a special arrangement with the landlord whereby the trustee guaranteed the rent so long as he occupied the building, the landlord agreeing meanwhile not to distrain, the trustee was deemed to have accepted the lease, and was held liable for the whole of the rent accruing for the remainder of the term: *North-West Theatre Co. v. MacKinnon* (1916), 52 S. C. R. 589, especially *per Duff* and *Anglin, J.J.* and see *Linton v. Imperial Hotel Co.* (1889), 16 O. A. R. 337.

<sup>9</sup>*Stein v. Pope* (1902), 1 K. B. 595; 71 L. J. K. B. 322; 9 Mans. 125. The difference between the English and Canadian Acts should be observed.

<sup>10</sup>See under the Act of 1875 *In re Erly* (1878), 2 O. A. R. 617, where it was held that the statute permitted proof for damages for cancellation both in the case of leases valid at law and also in the case of leases valid in equity.



Section 53

Notice.

Appeal.

Court may  
expunge or  
reduce proof.

he considers the claimant is not entitled to rank on the estate, or not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors, he may disallow the claim in whole or in part, and in such case shall give to the claimant a notice of disallowance. The said notice may be given either by serving the claimant with a copy thereof personally or by mailing such copy in a registered prepaid letter, addressed to the claimant at his last-known address, or at the address shown in or by the claimant's proof. Such disallowance shall be final and conclusive unless within thirty days after the service or mailing of the said notice or such further time as the court may on application made within the same thirty days allow, the claimant appeals to the court in accordance with General Rules from the trustee's decision.

- (2) The court may also expunge or reduce a proof upon the application of a creditor or of the debtor, if the trustee declines to interfere in the matter.

**Cross References Act:** Debts provable, 44; proof of debts, 45; proof by secured creditors, 46; meetings of creditors, 42; inspectors, 43; resolution means ordinary resolution, 2(ff), 2(z), 42(14) service by mail where no special mode directed, 83; computation of time, 82.

**Cross References Rules:** Notice of dividend is notice of admission of proof, 116; appeal from decision of trustee to be by notice of motion to a judge, 117; trustee in no case personally liable for costs in appeal from rejection of proof, 118; reckoning of days, 148.

**Cross References Forms:** Notice of disallowance of claim, 51.

**Analogous Legislation:** English Act, 1914, Schedule II., Rules 23, 25, 26; Canadian Act, 1875, ss. 93, 95; *Winding-up Act*, 1906, ss. 85-90; *Provincial Assignments Acts*, R. S. O. 1914, c. 134, s. 27; R. S. M. 1913, c. 12, ss. 32, 33.

## ANALYSIS OF NOTES.

Admission and disallowance of claims.

Matters with which trustee should be familiar when disallowing claims.

Trustee entitled to require satisfactory evidence of debt.

Trustee may not disallow claim because of collateral dispute.

Setting aside a reserve to meet a claim.

Duty to disallow statute-barred debts.



Claims of persons whose debts have been released or discharged.

Section 53

Creditors who attack a composition deed.

Creditors claiming as secured creditors.

Appeal from disallowance of proof.

Grounds of rejection.

Withdrawal of proof and tender of new proof.

Application to reduce.

Costs where debtor fails in motion to expunge.

English Rules 259, 260 provide for a time within which proofs must be admitted or rejected. There is no such provision in our Act or Rules. It would seem however that if the trustee does not disallow the claim within a reasonable time he will be taken to have admitted it<sup>1</sup>, although if the omission is by inadvertence, and there appears to be a substantial objection to the proof, the Court may give leave to the trustee to apply to expunge it.<sup>2</sup> It was held under *The Insolvent Act* of 1875, that where a secured creditor had valued his security for the purpose of proof the assignee should make his decision promptly whether he would allow the creditor to retain his security at the valuation given; and that the election of the assignee to allow the creditor to retain the security might be inferred from the fact that for six months after receipt of the proof and valuation he had made no move to dispute the valuation<sup>3</sup>. This case must, however, be considered in the light of section 46(6) of the present Act, which appears to put on the secured creditor the onus of requiring the trustee to elect.

Admission  
and disallow-  
ance of  
claims.

Before attempting to discharge the very important duties with respect to disallowance of claims which have been confided to him by the Act, the trustee should make himself familiar not only with the statutory provisions regarding proof of debts, proof by secured creditors and provable debts, but also with the rules which judicial interpretation has made part of those sections. In addition to the matters mentioned in the notes to sections 44, 45 and 46, there are several other points which the trustee should bear in mind.

Matters with  
which trustee  
should be  
familiar  
when dis-  
allowing  
claims.

The trustee's duty when examining a proof for the purpose of admitting or rejecting it is to require some

<sup>1</sup> *In re Russell ex parte Kemp* (1873), 42 L. J. Bank. 26; 21 W. R. 450.

<sup>2</sup> S. C.

<sup>3</sup> *Bell v. Ross* (1885), 11 O. A. R. 458.



## Section 53

Trustee  
entitled to  
require  
satisfactory  
evidence of  
debt.

satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against a bankrupt, no covenant given by, or account stated with him can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and an estoppel to which the bankrupt may have subjected himself will not prevail against the trustee<sup>4</sup>. The rule in England has been said to go even so far that when the only evidence of a debt is a judgment, and the judgment has been recovered after an available act of bankruptcy, the judgment debt cannot be proved in the bankruptcy<sup>5</sup>. The rule that on a proof for a judgment debt the court will go behind the judgment and ascertain whether there is a provable debt does not apply to a proof for assessed taxes<sup>6</sup>.

Trustee may  
not disallow  
claim  
because of  
collateral  
dispute.

It is a general rule that a trustee should not disallow a claim on the ground that there is a dispute on some collateral matter between him and the creditor. Where for example the creditor has property in his possession which the trustee asserts belongs to the estate the claim should be admitted, but the dividend may be withheld<sup>7</sup>.

<sup>4</sup> *Per* Cozens-Hardy, M.R., quoting Bingham, J., *In re Van Laun ex parte Chatterton* (1907), 2 K. B. 23, 30; 76 L. J. K. B. 644; 14 Mans. 91; *Ex parte Kibble in re Onslow* (1875), L. R. 10 Ch. 373; 44 L. J. Bank. 63. The court may go into such matters at the instance of the debtor himself even where the debtor has appealed against the judgment: *In re Fraser ex parte Central Bank of London* (1892), 2 Q. B. 633; 9 Mor. 256; cf. *McDonald v. Boice* (1865), 12 Gr. 48; and contrast under *The Creditors' Relief Act*, *Bowerman v. Phillips* (1888), 15 O. A. R. 679. And see notes to section 4(6). The Court will go behind a judgment said Esher, M.R., in *In re Flatau, ex parte Scotch Whiskey Distilleries* (1888), 22 Q. B. D. 83, 85; when there is "evidence . . . tending to show that there has been fraud, or collusion, or miscarriage of justice." But this does not mean that where there is no allegation of fraud or collusion the court is bound to go behind a judgment, even when the court is of the opinion that the decision was not correct. The working rule is that a Registrar can go behind a judgment which is by default or compromise, but not when the judgment was given in open court against a person who was represented: *In re Howell* (1915), 84 L. J. K. B. 1399; 1 H. B. R. 173.

<sup>5</sup> *Ex parte Bonham in re Tollemache* (1885), 14 Q. B. D. 604; 54 L. J. Q. B. 388. Under our Act the title of the trustee does not relate back as far as it does in England. See notes to s. 4(10).

<sup>6</sup> *In re and ex parte Calvert* (1899), 2 Q. B. 145; 68 L. J. Q. B. 761; 6 Mans. 256.

<sup>7</sup> *Ex parte Dobson in re Thompson* (1834), 1 M. & A. 666; *Ex parte Williams*, 4 D. & C. 180; *Ex parte Barvois*, 6 D. M. & G. 762; *Ex parte Marshall*, M. & Bl. 242; 1 M. & A. 118, 145; *Ex parte Simpson*, 1 Atk. 70.



Where a creditor's claim can not at once be ascer- Section 53  
 tained, it is probable that the court has jurisdiction Setting  
 under section 63 to direct the trustee on application by aside a  
 the creditor to reserve a sufficient sum to meet the reserve to  
 claim<sup>8</sup>. meet a claim.

It is the duty: it seems of the trustee to set up the Duty to  
 Statute of Limitations where it is available<sup>9</sup>. disallow  
statute-  
barred debts.

Where there has been a previous bankruptcy and Claims of  
 the debtor has been discharged, debts which were persons  
 provable in that bankruptcy are not provable whose debts  
 under a subsequent deed of arrangement, even have de-  
 though the debt and name of the creditor have been creased or  
 set out in the deed, unless the debt has been revived<sup>10</sup>. discharged.  
 Where creditors sign a composition deed containing  
 a release of the debtor from all claims and the debtor  
 is adjudicated bankrupt, the act of bankruptcy being  
 the execution of the deed, the creditors who have  
 signed the composition are not normally estopped from  
 proving in the bankruptcy; for the intention is that the  
 release is to stand or fall with the rest of the deed.<sup>11</sup>

Where creditors who are parties to a deed of Creditors  
 assignment or composition unsuccessfully seek to set who attack  
 it aside, they do not forfeit their rights under it. The a composi-  
 case might be different if, not being originally bound tion deed.  
 by the deed and having had an opportunity of electing  
 to accept or reject it, they elect to reject.<sup>12</sup>

Where a bankrupt falsely represented to certain Creditors  
 creditors that property which he proposed should be claiming as  
 mortgaged to the creditors as security for a further secured  
 advance was the property of his wife, and the advance creditors.  
 was made and the mortgage given, it was held that the  
 creditors, if they realized the property, could not  
 prove for the balance of their debt; for by so doing

<sup>8</sup> *In re Lee ex parte Good* (1880), 14 Ch. D. 82; 49 L. J. Bank. 40.

<sup>9</sup> *Gormley v. Deblois* (1912), 11 E. L. R. 575, 577, citing *Ex parte Dewdney* (1808), 15 Ves. 479; and see *Ex parte Kidd*, 7 Jur. N. S. 613; *Ex parte Roffey*, 2 Rose 245; and in the case of a voluntary liquidation: *In re Fleetwood and District Electric Light and Power Syndicate* (1915), 1 Ch. 486; (1915), H. B. R. 70.

<sup>10</sup> *In re Pilet, Ex parte Toursier* (1915), 3 K. B. 519; 84 L. J. K. B. 2133; (1915), H. B. R. 149.

<sup>11</sup> *In re Stephenson ex parte O. R.* (1888), 20 Q. B. D. 540; 57 L. J. Q. B. 451; 5 Mor. 44.

<sup>12</sup> *Gardner v. Kloepper* (1888), 15 S. C. R. 390, 396.



**Section 53** they were claiming as secured creditors. If their claim was in the nature of a claim founded on misrepresentation different considerations would arise.<sup>1</sup>

**Appeal from disallowance of proof.**

Where a creditor resident abroad appeals from the rejection of his proof, the Court in England will only in exceptional circumstances order him to give security for costs.<sup>2</sup>

**Grounds of rejection.**

When the trustee rejects a proof the practice in England is for him to give the grounds of his rejection. The court has in one case, without desiring to create a precedent, ordered him to give particulars of the grounds of rejection set out in his notice.<sup>3</sup>

**Withdrawal of proof and tender of new proof.**

While a creditor may withdraw his proof and tender another at any time before it has been adjudicated on, he may not withdraw it and tender a new one after an adjudication on the merits; though if the adjudication touches only a point of form he may do so.<sup>4</sup>

**Application to reduce.**

Where creditors accept a composition offered by the bankrupt, the fact that a proof has been on the file of the proceedings in bankruptcy for over a year will not estop the bankrupt from making an application to have the proof reduced.<sup>5</sup>

**Costs where debtor fails in motion to expunge.**

If a debtor, after the date of the receiving order or of the authorized assignment, moves unsuccessfully to reduce or expunge a proof, the costs of the motion are not provable in the bankruptcy; but if after the date of the receiving order he carries a composition extension or scheme, he will be required to pay the costs of such a motion in addition to what he pays under the composition.<sup>6</sup> The hardship upon creditors of putting

<sup>1</sup> *In re Cooksey ex parte Portal & Co.* (1900), 83 L. T. 435.

<sup>2</sup> *In re Pilling ex parte Chapman* (1906), 94 L. T. 682; *In re Semenza ex parte Paget* (1894), 1 Q. B. 15; 63 L. J. Q. B. 278; 1 Mans. 18, explaining *In re Vanderhaege ex parte Izard* (1887), 20 Q. B. D. 147; cf. *In re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118 as corrected *In re Queensland Mercantile Agency Co.* (1891), 61 L. J. Ch. 48.

<sup>3</sup> *In re Huntly, ex parte Goldstein* (1917), 87 L. J. K. B. 590; (1917), H. B. R. 270.

<sup>4</sup> *In re Deerpurst ex parte Seaton* (1891), 8 Mor. 258.

<sup>5</sup> *Ex parte Bacon in re Bond* (1880), 17 Ch. D. 447.

<sup>6</sup> *In re Pilling ex parte Surtee's Executors* (1909), 2 K. B. 788; 78 L. J. K. B. 1107; 16 Mans. 280.



them to almost irrecoverable costs is one of the reasons why in England a debtor is not usually allowed to move to expunge a proof unless he has got a composition agreed to'. Section 53

<sup>1</sup> S. C. citing *In re Benoist* (1909), 2 K. B. 784; 78 L. J. K. B. 1105; 16 Mans. 276; and see *In re Calvert* (1899), 6 Mans. 209; *Ex parte Bluck* (1887), 56 L. J. Q. B. 607; 4 Mor. 273.



## PART V.

## DEBTORS.

*Duties of Debtors.*

- |  |  |
|--|--|
| <p><b>Section 54</b></p> <p>Duty of debtors to submit statement.</p> | <p>54 (1) Where a receiving order or an authorized assignment is made, the bankrupt or assignor shall make out and submit to the trustee a statement of and in relation to his affairs in the prescribed form verified by affidavit and showing the particulars of the debtor's assets, debts, and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed or as the trustee may require. Such statement shall be submitted within seven days from the date of the receiving order or assignment, but the court may, for special reasons, extend the time.</p> |
| <p>Inspection by creditor.</p>                                       | <p>(2) Any person stating himself in writing to be a creditor of the bankrupt or assignor, may personally or by agent inspect the statement at all reasonable times and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of court, and shall be punishable accordingly on the application of the trustee.</p>   |
| <p>Debtor to attend first meeting.</p>                               | <p>(3) Every debtor against whom a receiving order is made and every assignor who makes an authorized assignment shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give</p>   |



such information as the meeting may Section 54  
require.

- (4) He shall give such inventory of his pro-<sup>Duties</sup> property, such list of his creditors and debtors,<sup>generally.</sup> and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the trustee, execute such powers of attorney, conveyances, deeds, and instruments, and, generally, do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the trustee, or may be prescribed by General Rules, or may be directed by the court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the trustee, or any creditor or person interested.
- (5) He shall aid, to the utmost of his power, in<sup>To aid</sup> the realization of his property and the dis-<sup>trustee.</sup>tribution of the proceeds among his creditors.
- (6) If a debtor wilfully fails to perform the<sup>Penalty for</sup> duties imposed on him by this section, or to<sup>failure to</sup> deliver up possession of any part of his pro-<sup>perform</sup> property which is divisible amongst his credi-<sup>duties</sup> tors under this Act and which is for the time<sup>imposed.</sup> being in his possession or under his control, to the trustee, or to any person authorized by the court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.

**Cross References Act:** Making of receiving order. 4(5); authorized assignment, 9; statement of affairs on application for composition, 13(2)(3); offence of making material omission in, 89(f); offences of non-disclosure, etc., 89; examination of debtor and others before registrar, 56, 65(2)(c); registrar has no power to commit for contempt, 65(3); computation of time, 82; extensions of time, 68(5).



**Section 54**

**Cross References Rules:** Statement of affairs, 97(1) (2) (3); computation of time, 148-151; applications to commit, 14-19, 48; debtor attending first meeting entitled to witness fees in some cases, 113.

**Cross References Forms:** Statement of affairs, 52; notice to debtor of meeting of creditors, 53; Application for committal for contempt, 56, 54, 55; order for committal, 57; warrant for committal, 58; order for discharge from custody on contempt, 59.

**Analogous Legislation:** English Acts, 1914, ss. 14(1) (2) (4), 22(1)-(4); 1883, ss. 16, 24.

## ANALYSIS OF NOTES.

Sec. 54(1) Statement of affairs.

Effect of admission of debt in statement of affairs.

Joint and separate assets and debts to be distinguished.

Sec. 54(3) Examination of debtor at first meeting.

Sec. 54(4) (5) Duty to aid trustee to utmost of his power.

Committal for contempt under 54(6).

Sec. 54(1)  
Statement  
of affairs.

The duty imposed on the debtor of making out a statement of his affairs is an important one. Under previous Canadian Acts if the debtor did not make full disclosure of his assets and later obtained his discharge, a creditor might even some years after the discharge obtain an order vacating the discharge, and reopening the proceedings for the due administration of the assets thus withheld<sup>8</sup>. The answers given by a debtor at the meetings of his creditors to questions put to him by his creditors respecting his affairs are to be taken as part of his statement of affairs<sup>9</sup>, and it would seem that information may in certain cases be incorporated in the statement of affairs by reference<sup>10</sup>.

<sup>8</sup> *McGee v. Campbell* (1882), 2 O. R. 130. The fact that the debtor has omitted to make full disclosure may also arise on an application for a discharge. See where a possibility of an interest under a will had been omitted: *In re Jones* (1868), 4 P. R. 317, 324; and see where information omitted from the statement was supplied verbally at the first meeting of creditors: *Re Martin and English* (1880), 5 O. A. R. 647. Under *The Insolvent Acts* of 1869 and 1875 only a limited discharge was given. The discharge was not from all liabilities whatsoever, but only against such as were provable against the debtor's estate, and "are mentioned and set forth in the statement of his affairs . . ."; *Standard Bank of Canada v. Johnson* (1877), 42 U. C. Q. B. 16, 19. There is no such provision in *The Bankruptcy Act*.

<sup>9</sup> *In re and ex parte Aaronson* (1878), 7 Ch. D. 713; 47 L. J. Bank. 60; *Ex parte Solomon in re Tilley* (1882), 20 Ch. D. 281; 51 L. J. Ch. 677; cf. *In re Martin and English* (1880), 5 O. A. R. 647.

<sup>10</sup> *In re and ex parte Amor* (1882), 21 Ch. D. 594; 52 L. J. Ch. 138.



Where the debtor's statement of affairs is incomplete, the trustee may require him to furnish additional particulars and may obtain an order to this effect<sup>1</sup> Section 54

An admission made by a bankrupt in his statement of affairs that a debt is due from him is not, after his death, admissible evidence against his trustee of the existence of the debt on the ground of its being "against interest" merely because it might turn out that there was a surplus<sup>2</sup>; and the acknowledgment of a debt contained in the statement of affairs will not take it out of the Statute of Limitations<sup>3</sup>. But where a debtor treats a debt as valid in his statement of affairs, and on that basis obtains the acceptance of a composition, he will be estopped from alleging its invalidity<sup>4</sup>. Effect of admission of debt in statement of affairs.

It was the case in liquidation by arrangement and it would seem to be a proper rule in bankruptcy that where a debtor is a partner his statement of affairs should show both joint and separate assets and debts and should distinguish between those which are joint and those which are separate; similarly where he has recently been a partner or describes himself as a partner, he should specify and distinguish joint and separate assets and debts, and state expressly that there are no debts and no assets of the partnership if such is the case<sup>5</sup>. Joint and separate assets and debts to be distinguished.

The debtor is required to attend the first meeting of creditors and to submit to examination at it. This examination is to be distinguished from the formal examination provided for by section 56 which takes place before the registrar or other prescribed person. Sec. 54(3) Examination of debtor at first meeting.

<sup>1</sup> See *In re Davis ex parte Turnpenny* (1892), 9 Mor. 278 Q. V., as to the remedy of the trustee where he believes a statement of the debtor to be untrue.

<sup>2</sup> *Ex parte Edwards in re Tollemache* (1884), 14 Q. B. D. 415.

<sup>3</sup> *Everett v. Robinson* (1858), 28 L. J. Q. B. 23; *Ex parte Topping in re Levey* (1865), 34 L. J. Bank. 44.

<sup>4</sup> *Roe v. Mutual Loan* (1887), 19 Q. B. D. 347; 56 L. J. Q. B. 541.

<sup>5</sup> See *E. R.* 287 and *In re and ex parte Cockayne* (1873), L. R. 16 Eq. 218; 42 L. J. Bank. 71; *Ex parte Gibbs in re Webb* (1875), L. R. 10 Ch. 382; 44 L. J. Bank. 73; *In re and ex parte Buckley* (1881), 16 Ch. D. 513; *In re and ex parte Amor* (1882), 21 Ch. D. 594; 52 L. J. Ch. 138; *In re Moore ex parte Philips* (1874), L. H. 19 Eq. 256.



**Section 54** The debtor must be personally present at the meeting of his creditors<sup>6</sup>. It is not sufficient that he be in a room immediately adjoining that in which the meeting is held, even though the creditors are informed of this<sup>7</sup>. The satisfactoriness of the cause of his absence is to be judged of, not by the debtor or his solicitor but by the creditors<sup>8</sup>. If any creditor desires to ask the debtor questions the majority cannot prevent him from doing so<sup>9</sup>.

It is a contempt of court to offer money to a bankrupt to purchase his silence on examination as to matters which it would be inconvenient to the briber to have disclosed, even though such matters are susceptible of a satisfactory explanation<sup>10</sup>.

Sec.  
54(4) (5)  
Duty to aid  
trustee to  
utmost of his  
power.

The debtor is required to aid the trustee to the utmost of his power in the proper administration of his estate, the realization of his property and the distribution of the proceeds among his creditors. Thus it is the duty of a debtor to assist his trustee by going to court and giving evidence quite apart from any subpoena<sup>1</sup>.

Under the provisions of *The English Bankruptcy Act* 1869, s. 19 (a section analogous to s. 54(4)), it was decided that the court had power to order the bankrupt to file a cash account of his receipts and payments for a specified period before his bankruptcy; but such an order ought not to be made except under special circumstances, *e.g.* where the bankrupt while in a large way of business was yet culpably negligent in not keeping books<sup>2</sup>.

The obligations imposed on the debtor by section 54(5)(6) exist even after his discharge. Thus a partner who after a discharge of the partnership estate

<sup>6</sup> *In re and ex parte Best* (1881), 18 Ch. D. 488; 51 L. J. Ch. 293; *Ex parte Hollender in re Cox* (1883), W. N. 186.

<sup>7</sup> *In re and ex parte Best*, *supra*.

<sup>8</sup> See *per* Lord Selborne, L.C., *In re and ex parte Best* (1881), 18 Ch. D. 488, 491; 51 L. J. Ch. 293.

<sup>9</sup> *Per* Cotton, L.J., *In re and ex parte Best* (1881), 18 Ch. D. 488; 51 L. J. Ch. 293.

<sup>10</sup> *In re Hooley, Rucker's Case* (1898), 5 Mans. 331.

<sup>1</sup> *In re Fitzgerald ex parte Hobbs* (1916), 2 H. B. R. 157.

<sup>2</sup> *In re and ex parte Moir* (1882), 21 Ch. D. 61; 51 L. J. Ch. 931; *In re and ex parte Cronmire* (1894), 2 Q. B. D. 246; 63 L. J. Q. B. 616; 1 Mans. 79.



receives partnership moneys and applies them in paying his separate creditors may be ordered to refund the moneys, and on failure to obey the order may be committed for contempt<sup>3</sup>.

But the duty to "do all such acts and things in relation to his property and the distribution of his property among his creditors as may be reasonably required by the trustee", and "to aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors" do not include an obligation to submit to a medical examination with a view to a policy being effected on the bankrupt's life<sup>4</sup>. It was decided under the corresponding section of *The English Bankruptcy Act 1883* and *The Married Women's Property Act 1882*, s. 1(5), that a bankrupt married woman could not be compelled to execute a general power of appointment in favor of her trustee, the capacity to exercise a general power of appointing property not being property<sup>5</sup>.

Under provisions analogous to 54(6), applications have been made and debtors have been committed for failure to deliver up property to the trustee<sup>6</sup>, or to a purchaser from the trustee<sup>7</sup>; for refusal to execute a power of attorney which was necessary to enable the trustee to deal with part of the estate abroad<sup>8</sup>; and for non-compliance with an order for payment by instalments of a portion of his salary to the trustee<sup>9</sup>.

The contempt of court referred to in section 54(6) is probably contempt of a criminal nature. If so no privilege from arrest can be claimed<sup>10</sup>. Anything

Committal  
for contempt  
under 54(6).

<sup>3</sup> *In re and ex parte Waters* (1874), L. R. 18 Eq. 701; 43 L. J. Bank. 128.

<sup>4</sup> *Board of Trade v. Block* (1888), 13 A. C. 570; 58 L. J. Q. B. 113; *per Cave, J.*, *In re Garnett ex parte Bullock* (1885), 16 Q. B. D. 698, 699; 55 L. J. Q. B. 77; 2 Mor. 286.

<sup>5</sup> *Ex parte Gilchrist in re Armstrong* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 3 Mor. 93.

<sup>6</sup> *In re and ex parte Waters* (1874), L. R. 18 Eq. 701; 43 L. J. Bank. 128; *In re and ex parte Ashwin* (1891), 8 Mor. 130.

<sup>7</sup> *In re and ex parte Burgoyne* (1891), 8 Mor. 139.

<sup>8</sup> *Ex parte Trustee in re Harris*. (1896). 3 Mans. 46.

<sup>9</sup> *In re Pickard ex parte O. R.* (1912), 1 K. B. 397; 81 L. J. K. B. 330; 19 Mans. 58.

<sup>10</sup> See *Ex parte Lindsay in re Armstrong* (1892), 1 Q. B. 327, 329, 330; 8 Mor. 271; *In re Freston* (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545.



**Section 55** which interferes with the due administration of the estate in bankruptcy is a contempt. In such case the proper practice is to apply to the court to commit, not to apply for an injunction. On an application to commit the court can prohibit acts interfering with proper administration<sup>1</sup>.

On a motion to commit, the case must be strictly proved if the bankrupt does not appear in response to the notice of motion<sup>2</sup>.

Where there is another remedy open to the trustee, the court may refuse to commit<sup>3</sup>. An appeal lies from a refusal to commit, but the appeal court will be slow to override the discretion of the court below<sup>4</sup>. Failure to perform certain of the duties imposed on the debtor is punishable under section 89.

### *Arrest of Debtors.*

Arrest of  
debtors  
under certain  
circum-  
stances.

55(1) The court may, by warrant addressed to any constable or prescribed officer of the court, cause a debtor to be arrested, and any books, papers, money and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the court may order under the following circumstances:—

(a) If, after the presentation of a bankruptcy petition against him, it appears to the court that there is probable reason for believing that he has absconded, or is about to abscond from Canada, with a view of avoiding payment of the debt in respect of which the bankruptcy petition

<sup>1</sup> *In re Eliot, Pearce & Co., ex parte Allday and Bushill* (1897), 13 T. L. R. 486.

<sup>2</sup> *In re Vaughan* (1916), 2 H. B. R. 55. See as to proof of service by post *In re Pickard ex parte O. R.* (1912), 1 K. B. 397; 81 L. J. K. B. 330; 19 Mans. 58; and as to notice given by telegram of the granting of an injunction *Ex parte Langley in re Bishop* (1879), 13 Ch. D. 110; 49 L. J. Bank. 1.

<sup>3</sup> *Ex parte Turnpenney in re Davis* (1892), 9 Mor. 278.

<sup>4</sup> *Jarmain v. Chatterton* (1882), 20 Ch. D. 493; 51 L. J. Ch. 471; and see *Swinfen v. Swinfen*, 26 L. J. C. P. 97.



was filed, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs or of otherwise avoiding, delaying or embarrassing proceedings in bankruptcy against him; Section 55

(b) If, after presentation of a bankruptcy petition against him or after an authorized assignment has been made by him, it appears to the court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or any books, documents or writings which might be of use to the trustee or to his creditors in the course of the bankruptcy or authorized assignment proceedings;

(c) If, after service of a bankruptcy petition on him or after he makes an authorized assignment, he removes any goods in his possession above the value of twenty-five dollars without the leave of the trustee.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences. Payments after arrest.

**Cross References Act:** Examination of debtor, 56. and see 54(3); enforcement and execution of warrants, 72; commitment to prison, 73.

**Cross References Rules:** Warrants to be sealed, 10; to whom warrant to be addressed, 44; duty of sheriff and other officers, 52; custody and production of debtor, 45; execution of warrant, 46, 47; suspension of order of committal, 48; practice where witness refuses to attend, 49; service and execution of process, 50-53; presentation of petition, 76.

**Cross References Forms:** Warrant of seizure, 60; warrant of arrest against debtor, 61.

**Analogous Legislation:** English Acts, 1914, s. 23; 1883, s. 25; 1869, s. 86.



## Section 55

## ANALYSIS OF NOTES.

Section 55(1)(a) only applies where bankruptcy petition presented.  
Action for malicious arrest under 55(1)(a)(b).

Warrant under 55(1)(c).

Warrant made on incomplete affidavit is bad.

Door may be broken open.

When warrant completely executed.

To whom bond for release from arrest should be given.

Custody of debtor charged with an offence.

Sec. 55(1)(a)  
only applies  
where bank-  
ruptcy  
petition  
presented.

It would appear that section 55(1)(a) is defective in that it does not apply to a debtor who has made an authorized assignment unless a bankruptcy petition has been presented against him. Sections 55(1)(b) and 55(1)(c) apply in both cases. Until an amendment is made to the section, this difficulty can be got over by the presentation of a bankruptcy petition if the creditor has a debt of the proper amount. The words "has absconded" in 55(1)(a) which reads: "If after the presentation of a bankruptcy petition against him, it appears to the court that there is probable cause for believing that the debtor *has absconded*, or is about to abscond" are not limited as to time and permit of a warrant being issued when the absconding took place before a petition was presented<sup>5</sup>.

Where a foreigner temporarily in Canada prepares to leave the country the same presumption of an intent to avoid payment of his debt does not necessarily arise as in the case of a person domiciled in Canada<sup>6</sup>.

Action for  
malicious  
arrest under  
55(1)(a)(b).

*Seemle*, no action will lie against a person at whose instance a warrant is issued under section 55(1)(a)(b), unless the warrant was obtained by falsehood or fraud, for the warrant is not issued by the plaintiff without the intervention of any other authority, but is issued in the discretion of the court<sup>7</sup>.

Warrant  
under  
55(1)(c).

On an application for a warrant under section 55(1)(c), the creditor must produce an affidavit testifying as a matter of fact that the goods are above the

<sup>5</sup> *Skinner v. County Court Judge of Northallerton* (1898), 2 Q. B. 680; 68 L. J. Q. B. 24; affd. (1899), A. C. 439; 68 L. J. Q. B. 896; 6 Mans. 274.

<sup>6</sup> See *In re and ex parte Gutierrez* (1879), 9 Ch. D. 298; and see *In re and ex parte Crispin* (1873), L. R. 8 Ch. 374, 382; 42 L. J. Bank. 65.

<sup>7</sup> See *Daniels v. Fielding* (1846), 16 M. & W. 200; and see *Wills v. Snook*, 8 M. & W. as to the belief of the creditor of the intention of the debtor to abscond.



value of twenty-five dollars. An expression of belief is not sufficient<sup>8</sup>. Section 56

If the warrant is expressed to be made on an affidavit the jurat of which has not been signed, the warrant is bad, and will be discharged without prejudice to an application for a fresh warrant<sup>9</sup>. Warrant made on incomplete affidavit is bad.

As appears by Form 60, the warrant of seizure is authority to break open the door of the defendant's house if necessary. Similarly under a warrant of arrest, although the form says nothing of this, the officer of the court in England may break open a door to effect the arrest of the debtor<sup>10</sup>. Door may be broken open.

A warrant is not completely executed until the debtor is lodged in the prison named in the warrant. This may be important with respect to the fees of the bailiff or other officer charged with its execution.<sup>11</sup> When warrant completely executed.

Where a debtor has been arrested and proposes to give a bond with sureties to obtain his release from prison, the bond should be given to the registrar in bankruptcy.<sup>1</sup> If the bond is subsequently forfeited the proceeds will as a general rule go, not to the Crown, but to the creditors.<sup>2</sup> To whom bond for release from arrest should be given.

A debtor arrested under section 55(b) has been ordered to be delivered over to a police officer bearing a warrant for his arrest in respect of an alleged offence under section 89(e).<sup>3</sup> Custody of debtor charged with an offence.

### *Examination of Debtors and Others.*

- 56 (1) Where a receiving order or an authorized assignment has been made, the trustee, upon ordinary resolution passed by the creditors present or represented at a meeting regularly called, or upon the written Examination of debtors and others.

<sup>8</sup> *Ex parte McDowall in re Ross* (1870), W. N. 176.

<sup>9</sup> *In re and ex parte Heyman* (1872), L. R. 7 Ch. 488.

<sup>10</sup> *In re Von Weissenfeld ex parte Hendry* (1892), 9 Mor. 3.

<sup>11</sup> *In re Crompton ex parte Fox* (1911), 2 K. B. 309; 80 L. J. K. B. 822; 18 Mans. 119.

<sup>1</sup> *In re Gordon, in re Salmond* (1903), 2 K. B. 164; 72 L. J. K. B. 587. The form of bond in use in England is given in the report of this case.

<sup>2</sup> S. C.

<sup>3</sup> *In re Abraham* (1921), 1 C. B. R. 427 (Panneton, J.).



Section 56

Penalty for failure to attend for examination.

request or resolution of a majority of the inspectors of the estate, may, without an order, examine under oath before the registrar of the court or other prescribed person, the debtor or any person who is or has been an agent, clerk, servant, officer, director or employee of the debtor, respecting the debtor, his dealings or property, and, in the case of a bankrupt, as to any property, acquired or disposed of by him subsequently to the date of the receiving order.

- (2) If the debtor, or any person liable to be examined as provided by the preceding subsection, is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fees, but refuses or neglects to attend as required by such appointment or summons, or, if attending, refuses to make satisfactory answers to any questions asked him or refuses to produce any book, document or other paper, having no lawful impediment made known to the examiner at the time of his sitting for such examination and allowed by him, the court may, by warrant, cause the debtor or other person so in default to be apprehended and brought up for examination, and may order him to be committed to the common gaol of the judicial district in which he resides for any term not exceeding twelve months.

Expenses and fees.

- (3) The amount of conduct money and witness fee shall be fixed by General Rules.

Trustee may require books and other property of debtor to be produced.

- (4) If any person has, or is believed or suspected to have, in his possession or power any of the property of the debtor, or any book, document or paper of any kind relating in whole or in part to the debtor, his dealings or property, or showing that such person is indebted to the debtor, such person may, upon ordinary resolution passed by



the creditors present or represented at a Section 56  
regularly called meeting (exclusive of  
such person, if he is a creditor), or upon  
the written request or resolution of the  
majority of the inspectors of the estate, be  
required by the trustee to produce such  
book, document or paper for the informa-  
tion of such trustee, or to deliver over to him  
any such property of the debtor.

- (5) If such person fails to produce such book, document or other paper, or to deliver over such property, within four days of his being served with a copy of the said resolution and a request of the trustee in that behalf, or if the trustee or the majority of the inspectors is or are not satisfied that full production or delivery has been made, the trustee may, without an order, examine the said person before the registrar of the court or other prescribed person touching any such property, book or document or other paper which he is supposed to have received. Examination on failure to produce.
- (6) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as is provided by subsections two and three of this section. Compelling attendance.
- (7) If any person on such examination admits that he is indebted to the debtor, the court may, on the application of the trustee, order him to pay to the trustee, at such time and in such manner as to the court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination. Admission of debt.



## Section 56

Admission  
of having  
debtor's  
property.

- (8) If any person on such examination admits that he has in his possession any property belonging to the debtor, the court may, on the application of the trustee, order him to deliver to the trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as to the court may seem just.

**Cross References Act:** Making of R. O., 4(5); of A. A., 9; ordinary resolution, 2(z), 42(14); inspectors, 43; examination of debtor at first meeting of creditors, 54(3); arrest of debtor about to abscond to avoid examination, 55(1)(a); offence of not discovering to the trustee all his property, 89(a); property defined, 2(dd); property acquired by bankrupt after date of R. O., 25(a); jurisdiction of registrar to hold examination of debtor, 65(2)(b). and to summon and examine certain persons, 65(2)(h); registrar has no power to commit for contempt, 65(3); in case of death sealed deposition admitted as evidence, 81; service by post, 83; enforcement and execution of warrants, 72; commitment to prison, 73.

**Cross References Rules:** Persons before whom examination may be held, 131; in what bankruptcy district examination may be held, 132; appointment for examination may be granted in duplicate, 133; duplicate to be served forty-eight hours before time for examination, 134; witnesses entitled to fees and conduct money, 42; attendance of witness on subpoena, 34, 35; order for examination of witnesses on oath, 37; depositions may be taken in shorthand, 38; order of attendance for production, 40; disobedience of subpoena or order a contempt of court, 41; form of commission, 39; costs of witnesses may be allowed, 36; discovery, interrogatories and examination for discovery, 43; warrants to whom addressed, 44; duty of sheriff and other officers, 52; execution of warrant under this section 46, 47; practice where witness refuses to attend, 49; suspension of order of committal, 48; service and execution of process, 50-52; service by post, 52; orders of court may be enforced as if judgments, 53; computation of time. 148-151; proceedings to be in chambers, 4; jurisdiction of registrar, 5; practice where not specially provided for, 152; all proceedings to remain of record, 9; warrants to be sealed, 10; no lien as against trustee on debtor's books of account, 145.

**Cross References Forms:** Appointment for examination of debtor or others, 62; declaration by shorthand writer, 63; notes of examination of debtor or others, 64; allowances to witnesses, Tariff ss. 89-91.

**Analogous Legislation:** English Acts, 1914, ss. 15, 25; 1883, ss. 17, 27; 1869, s. 96. Canadian Acts, 1875, ss. 23-26; 1869, ss. 112, 114. Winding-up Act, R. S. C. 1906, c. 144, ss. 117-121. Provincial Assignments Acts, R. S. O. 1914, c. 134, ss. 38-41; R. S. M. 1913, c. 12, ss. 50-56; Alta. 1907, c. 6, ss. 52-58; R. S. B. C. 1911, c. 13, ss. 49-50.

## ANALYSIS OF NOTES.

Practice under section 56(1).

In England examination of debtor is public.

Examination of other persons in private.

Object of section.



No "witness" may refuse to answer on the ground that the answer may tend to criminate him. Section 56

English practice witness may claim privilege but not debtor.

Debtor may not refuse to attend or answer.

Examination of witness is by the court.

Witness entitled to have counsel present.

Trustee must have some evidence that witness can testify.

Witness may be asked any pertinent question.

Who may be examined.

Examination may not be used for ulterior purpose.

Cannot order witness to furnish account in writing

Whether a creditor has right to require examination of person under 56(1).

Whether debtor may be examined as judgment debtor.

Right of witness to a copy of his examination.

Service.

Where witness ill examination may be at his residence.

Only recalcitrant person to be brought up by warrant.

Distinguish arrest under 56(2) and committal for contempt.

Form of warrant under, 56(2).

Punishment under, 56(2).

56(3) Recovery of conduct money and fee.

Section 56(4) (5) (6) machinery for the obtaining of evidence.

Books, documents and papers mentioned are not those of the debtor.

Books must relate to debtor.

Clerk or servant may not be ordered to produce.

Depositions to be placed on file.

Whether section 56 may be invoked under composition.

The practice under section 56(1) has yet to be determined, for the section follows neither *The English Bankruptcy Act*, the Provincial Assignments Acts nor *The Winding-Up Act*. Practice under Sec. 56(1).

The principal point of difference between *The English Bankruptcy Act* and the Canadian Statute lies in the fact that there is no section in our Act corresponding with the English section 15. That section makes obligatory a public examination of the debtor as to his *conduct*, dealings and property. The examination is to be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs, and therefore before the first meeting of creditors. Creditors may be present and may question the debtor concerning his affairs and the causes of his failure. Under our section 56, the examination is not obligatory. The debtor must, however, submit to examination at the first meeting of creditors<sup>4</sup>. In England examination of debtor is public.

<sup>4</sup> Section 54(3).



## Section 56

Examination  
of other  
persons in  
private.

The English section which most nearly corresponds with section 56 is section 25, which has to do with discovery of the debtor's property, and with information respecting the debtor, his dealings or property. As is the case under *The Winding-Up Act*, the examination under that section is in private, for it is not a judicial inquiry<sup>5</sup>, and the court if it has power to order a public examination has such power only in the most exceptional circumstances<sup>6</sup>. The debtor is not entitled to attend when other persons are being examined, and if he does attend he has no right to cross examine witnesses<sup>7</sup> nor are the creditors entitled *ex debito justitiæ* to be present<sup>8</sup>. The clause has been called the Star Chamber clause<sup>9</sup>.

Thus in compressing two totally different sections into one, difficulties have been raised. Whether the traditional rule with respect to the private examination of other persons will be followed has yet to be determined. The following notes give the law as it exists under that practice.

Object of  
section.

The examination is for the purpose of obtaining the fullest information about the debtor's property and also to collect information which the court will have to consider when the bankrupt comes to apply for his discharge<sup>10</sup>, and should be liberally construed<sup>1</sup>.

No "witness"  
may refuse  
to answer on  
the ground  
that the  
answer may  
tend to  
criminate  
him.

No "witness" at an examination under section 56 (1)(5), may refuse to answer any question on the ground that the answer may tend to criminate him; but the answer given is not receivable in evidence against him in any criminal trial other than a prosecu-

<sup>5</sup> *In re Greys Brewery* (1883), 25 Ch. D. 400; 53 L. J. Ch. 262.

<sup>6</sup> See *In re Property Ins. Co.* (1914), 1 Ch. 775; 83 L. J. Ch. 525.

<sup>7</sup> *In re and ex parte Beall* (1894), 2 Q. B. 135; 63 L. J. Q. B. 425; 1 Mans. 203.

<sup>8</sup> *In re Greys Brewery* (1883), 25 Ch. D. 400; 53 L. J. Ch. 262; *In re Norwich Fire Ins. Co.* (1884), 27 Ch. D. 515; 54 L. J. Ch. 254; *Ex parte Swift in re Russell* (1872), 26 L. T. 226. Under exceptional circumstances the debtor may examine a person claiming to be a creditor: *In re and ex parte Austin* (1876), 4 Ch. D. 13; 46 L. J. Bank. 1; cf. *Ex parte Sheffield in re Austin* (1879), 10 Ch. D. 434; *Bird v. Philpott* (1900), 1 Ch. 822; 69 L. J. Ch. 487; 7 Mans. 251.

<sup>9</sup> See per Chitty, J., *In re Greys Brewery* (1883), 25 Ch. D. 400, 408, 53 L. J. Ch. 262.

<sup>10</sup> *In re and ex parte Beall* (1894), 2 Q. B. 135; 63 L. J. Q. B. 425; 1 Mans. 203; *In re Sovereign Bank of Canada* (1915), 34 O. L. R. 577.

<sup>1</sup> See per Armour, C.J., *In re Guinane* (1898), 18 P. R. 208.



tion for perjury". *Semble*, the debtor himself is a "witness" who may not refuse to answer<sup>2</sup>. Section 56

Under the English practice a debtor may not refuse to answer a question on the ground that it tends to criminate him, but a mere witness may in a genuine case claim privilege on that ground<sup>4</sup>. English practice witness may claim privilege but not debtor.

The court will allow the claim, when satisfied, not merely from his statement, but from the circumstances of the case and the nature of the evidence, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer<sup>5</sup>. The practice in England is not to press such questions when a charge is hanging over the bankrupt; but this is a rule of convenience only which need not be followed when the balance of convenience is the other way<sup>6</sup>. An application to postpone the examination, or to exclude for the time being any questions on the ground that a criminal prosecution for libel is pending, and that the answers given at the examination might possibly be used as evidence against the debtor at the trial, should be made to the registrar and not to the court if the examination is being conducted before the registrar<sup>7</sup>.

After a receiving order and adjudication have been made the debtor cannot refuse to attend for examination on the ground that the receiving order should not have been made and the adjudication should be annulled<sup>8</sup>. A debtor may not refuse to answer questions on Debtor may not refuse to attend or answer.

<sup>2</sup> *Canada Evidence Act*, R. S. C. 1906, c. 145, ss. 2, 5. See *Re Ginsberg*, 40 O. L. R. 136, and the Provincial provisions there referred to.

<sup>3</sup> See *per Hodgins, J.A.*, in *re Ginsberg*, 40 O. L. R. 136, at 142; contrast *per Rose, J.*, in *Regina v. Fox* (1899), 18 P. R. 343, 357.

<sup>4</sup> *Ex parte Schofield in re Firth* (1877), 6 Ch. D. 230; 46 L. J. Bank. 112.

<sup>5</sup> *In re and ex parte Reynolds* (1882), 20 Ch. D. 294; 51 L. J. Ch. 756; 46 L. T. 508, following *Reg. v. Boyes* (1861), 1 B. & S. 311; *In re Genese ex parte Gilbert* (1886), 3 Mor. 223.

<sup>6</sup> *In re Atherton* (1912), 2 K. B. 251; 81 L. J. K. B. 791; 19 Mans. 126; and see further and as to whether the evidence so given can be used against him: *Reg. v. Scott* (1856), 25 L. J. M. C. 128; *Reg. v. Widdop* (1872), L. R. 2 C. C. R. 3, especially at 8; 42 L. J. M. C. 9; *Reg. v. Robinson* (1867), L. R. 1 C. C. R. 80, especially at 90; 36 L. J. M. C. 78; *Reg. v. Erdheim* (1896), 2 Q. B. 260; 65 L. J. M. C. 176; 3 Mans. 142; a direct question whether he has done some criminal act is improper: *Ex parte Kirby, M. & M.* 225; *Ex parte Cossens*, Buck. 31.

<sup>7</sup> *In re Butterfield* (1890), 7 Mor. 293.

<sup>8</sup> *In re and ex parte Clifton* (1890), 7 Mor. 59.



**Section 56** the ground that the property to which the questions relate is beyond the jurisdiction of the court. It is his duty to make a full disclosure of his property<sup>9</sup>. While it may be a rule of convenience that the trustee should endeavour to obtain privately from the debtor all the information which he may require before putting the estate to the expense of an examination under this section the debtor has no right to refuse to answer questions put to him on his examination on the ground that the trustee has not come to him privately, or ought to have been satisfied with the information already given<sup>10</sup>.

**Examination of witness is by the court.** A witness examined under the English section corresponding to section 56(1), is a witness of the court, and although it is convenient to allow the counsel or other representatives of the trustee to put the questions, the conduct of the examination rests with the court<sup>1</sup>. It is the duty of the registrar to stop counsel if the question is one which is clearly irrelevant and ought not to be put; or if it misleads<sup>2</sup>.

**Witness entitled to have counsel present.** *Seemle*, a witness required to attend for examination under 56(2), is entitled to have counsel and solicitor present on his behalf, who may re-examine him for the purpose of explaining his examination-in-chief<sup>3</sup>, but he is not entitled to the costs of their attendance; unless possibly the object of the examination is to obtain evidence to be used against him; as where it is alleged that he has property of the bankrupt in his possession<sup>4</sup>, or is in fact a principal party<sup>5</sup>.

<sup>9</sup> See *Re Butterfield* (1890), 7 Mor. 293.

<sup>10</sup> *Ex parte Close in re Bennett* (1877), 5 Ch. D. 145; 46 L. J. Bank. 81.

<sup>1</sup> *In re Scharrer ex parte Tilly* (1888), 20 Q. B. D. 518; 5 Mor. 79; *In re North Australian* (1890), 45 Ch. D. 87; 59 L. J. Ch. 654.

<sup>2</sup> *Per Esher, M.R., In re and ex parte Pennington* (1888), 5 Mor. 216, 268; 59 L. T. 774. If the court finds that the answers of witnesses have been suggested by counsel it will take this into account in considering the value to be placed on the answer: *Re Tillett ex parte Harper* (1890), 7 Mor. 286.

<sup>3</sup> *In re Cambrian Mining Co.* (1881), 20 Ch. D. 376; 51 L. J. Ch. 221; and may take notes for this purpose: *In re Walker & Co. ex parte Childe* (1909), 100 L. T. 860; 16 Mans. 207; 53 S. J. 486.

<sup>4</sup> *Ex parte Waddell in re Lutscher* (1877), 6 Ch. D. 328.

<sup>5</sup> See *Ex parte Kemp in re Russell* (1873), 42 L. J. Bank. 26, at 28; and *cf. Ex parte Pratt in re Hayman* (1882), 21 Ch. D. 439; 52 L. J. Ch. 120; and *Ex parte Hall in re Cooper* (1882), 19 Ch. D. 580; 51 L. J. Ch. 556.



Before the trustee is entitled to examine a witness under section 56(1), with respect to the debtor, his dealings or property, he must, it seems, have some evidence that the witness is capable of giving some information with respect to the debtor, his dealings or property<sup>6</sup>. But if a witness properly called says that he knows nothing of the debtor, his dealings or property, the trustee is not concluded by this, and may ask him questions which go to his credit, and test whether his statement will stand or not<sup>7</sup>.

**Section 56**  
Trustee must have some evidence that witness can testify.

A witness may, it seems, be asked any question pertinent to the bankrupt, his dealings or property, such as questions respecting the movements of the bankrupt's wife<sup>8</sup>, or the residence of the bankrupt's father<sup>9</sup>; and may even be required to answer questions which refer to mere hearsay, for hearsay might put the trustee on the track of the information he desires, and there is no issue being tried under this section, the object being to enable the trustee to get at the true state of affairs<sup>10</sup>. Hence a solicitor who is being examined may be required to disclose his client's residence, unless it has been communicated to him confidentially in his capacity of professional advisor<sup>1</sup>.

Witness may be asked any pertinent question.

A former business manager of a partnership may be examined under section 56(1), for he is within the words "agent, clerk, servant, officer or employee"<sup>12</sup>, but a person who can give such evidence may not decline to attend on the ground that the bankrupt knows as much about the matters as the witness, or that the witness is an arbitrator before whom certain of the matters to be inquired into will come for his

Who may be examined.

<sup>6</sup> *In re Debtor ex parte Goldstein* (1917), 1 K. B. 558; 86 L. J. K. B. 705; (1917), H. B. R. 155, and unless there is *prima facie* evidence that the property in dispute is the property of the bankrupt it may be that the statute has no application: *Ex parte Smith in re Bevan & Co.* (1881), 45 L. T. 447.

<sup>7</sup> *In re Scharrer ex parte Tilley* (1888), 20 Q. B. D. 518; 5 Mor. 79, explaining *In re Purvis*, 56 L. T. (N. S.) 579.

<sup>8</sup> *Ex parte Vogel* (1818), 2 B. & Ald. 219.

<sup>9</sup> *Ex parte Campbell in re Cathcart* (1870), L. R. 5 Ch. 703.

<sup>10</sup> *In re The Ottoman Co., Ltd.* (1867), 15 W. R. 1069.

<sup>11</sup> *Ex parte Campbell in re Cathcart* (1870), L. R. 5 Ch. 703; *In re Arnott ex parte Official Receiver* (1888), 5 Mor. 286; and see other instances *In re Wells ex parte Trustee* (1892), 9 Mor. 116.

<sup>12</sup> *In re Guinane* (1898), 18 P. R. 208.



Section 56 decision<sup>3</sup>. An examination under the corresponding English section can only be directed by order of the court; and a witness aggrieved by an order for his examination should apply to the Court to rescind the order<sup>4</sup>.

Examination may not be used for ulterior purpose.

An examination will not be permitted when its object is not to benefit the creditors in bankruptcy, but for the private advantage in actions outside bankruptcy of one or more creditors<sup>5</sup>. Nor may the trustee examine under this section for the purpose of compelling by an indirect method the production of information which he has been forbidden to ask for in an action<sup>6</sup>. *Quære*, whether the trustee may use this section to obtain discovery in an action between him and a third party who claims certain property of the debtor as his<sup>7</sup>.

Cannot order witness to furnish account in writing.

The section does not give jurisdiction to order a witness to furnish an account in writing of transactions between himself and the bankrupt<sup>8</sup>.

Whether a creditor has right to require examination of person under 56(1).

It would seem that an individual creditor has no right to require the examination of a person under section 56(1); for the Act gives the creditors and the inspectors the right of requiring such examination<sup>9</sup>. It has, however, yet to be decided whether an examination under section 56(1) is a "proceeding" within section 35, which a creditor is entitled to take. Two distinctions may be suggested: the first the difference between examination of mere witnesses and of a person

<sup>3</sup> *In re MacDonald, Deakin & Jones* (1914), 58 S. J. 798.

<sup>4</sup> *In re Debtor ex parte Goldstein* (1917), 1 K. B. 558; 86 L. J. K. B. 705; (1917), H. B. R. 155.

<sup>5</sup> *In re Easton ex parte Davies* (1891), 8 Mor. 168, and at 171; 64 L. T. 798; *In re Desportes* (1893), 10 Mor. 40; 68 L. T. 233; *In re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314.

<sup>6</sup> *In re North Australian* (1890), 45 Ch. D. 87; 59 L. J. Ch. 654.

<sup>7</sup> *Ex parte Gittins in re Franks* (1892), 1 Q. B. 646; 40 W. R. 384; 9 Mor. 90.

<sup>8</sup> *In re and ex parte Reynolds* (1882), 21 Ch. D. 601.

<sup>9</sup> Compare under the English Act *Ex parte Nicholson in re Willson* (1880), 14 Ch. D. 243; 49 L. J. Bank. 68; 43 L. T. 266; *Ex parte Crossley in re Taylor* (1872), L. R. 13 Eq. 409; 41 L. J. Bank. 25; *Re Whicher ex parte Stevens* (1888), 5 Mor. 173, where a creditor applied for permission to examine the trustee, the bankrupt and his brother; *In re Russell ex parte Smith*, 26 L. T. 226; *In re Willson ex parte Nicholson*, 14 Ch. D. 243; *In re and ex parte Austin*, 4 Ch. D. 13.



with whom litigation is pending or intended<sup>10</sup>; the second the difference between an examination under 56 as an end in itself, and such an examination as part of other proceedings. Section 56

It was held under the section of *The Ontario Assignments and Preferences Act*, which most nearly corresponds with section 56(1), that the making of an assignment for the benefit of creditors, did not deprive a judgment creditor of his right to examine the judgment debtor though it may in some cases furnish a reason why the examination should not be made<sup>1</sup>, and this right remained even after the insolvent assignor had been examined under *The Provincial Assignments Act*<sup>2</sup>. Whether debtor may be examined as judgment debtor.

While a witness as witness may have no right to a copy of his examination, he may have a right to it in his capacity of creditor, particularly where the trustee is seeking to prove that he has been given a fraudulent preference<sup>3</sup>. The practice in England where one party proposes to make use of an examination already on file in the court is not to allow the costs of making a copy of it for service on the other party, for he can make extracts of it from the file; but in certain cases the cost of copies supplied for the use of the respondent's counsel may be allowed<sup>4</sup>. Right of witness to a copy of his examination.

Section 56(2) is given in the form in which it now stands as enacted by section 14 of *The Bankruptcy Act Amendment Act 1920*, and amended by section 44 of *The Bankruptcy Act Amendment Act 1921*.<sup>5</sup>

<sup>10</sup> See *In re Appleton, French, Scrafton & Co.* (1905), 1 Ch. 749; 74 L. J. Ch. 471; 12 Mans. 335; *Ex parte Waddell in re Lutscher* (1877), 6 Ch. D. 328; *In re Greys Brewery* (1883), 25 Ch. D. 400; 53 L. J. Ch. 262.

<sup>1</sup> *McEachren v. Gordon* (1899), 18 P. R. 459.

<sup>2</sup> *Bank of Hamilton v. Scott* (1904), 3 O. W. R. 716, 717.

<sup>3</sup> *Ex parte Pratt in re Hayman* (1882), 21 Ch. D. 439; 52 L. J. Ch. 120.

<sup>4</sup> *Ex parte Hall in re Cooper* (1882). 19 Ch. D. 580; 51 L. J. Ch. 556.

<sup>5</sup> The previous section read:

(2) If the debtor, or any person liable to be examined as provided by the preceding sub-section, is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fee, but refuses or neglects to attend as required by such appointment or summons, or, if attending, refuses to make satisfactory answers to any questions asked him or refuses to produce any book, document or other paper, having no lawful impediment made known to



## Section 56

## Service.

Service of the appointment or summons may be by registered post in accordance with section 83 and rule 52<sup>8</sup>. The conduct money and witness fees may be sent with the summons by registered post in money or postal orders<sup>7</sup>. A duplicate of the appointment must be served on the debtor or person to be examined at least forty-eight hours before the time of examination<sup>8</sup>. Objections to the regularity of the service can be waived<sup>9</sup>.

Where witness ill examination may be at his residence.

If the witness is too ill to attend, the court may by virtue of this section and Rule 37 direct the examination to be conducted at the residence of the witness before some prescribed person<sup>10</sup>.

Only recalcitrant persons to be brought up by warrant.

The power given by section 56(2) to bring up a person by warrant for examination and to commit him to gaol for twelve months should only be used in the case of recalcitrant persons<sup>1</sup>.

Distinguish arrest under 56(2) and committal for contempt.

The power to order the person who has disobeyed the summons to be apprehended and brought up for examination is distinct from the power to commit for contempt for disobedience of an order to attend for examination<sup>2</sup>. An order of committal under section 56 is to be distinguished from one under section 54; under 56 the order is not punitive, and consequently privilege from arrest may be claimed<sup>3</sup>.

No form of warrant has been provided for the

the examiner at the time of his sitting for such examination and allowed by him, the court may, by warrant, cause the debtor to be apprehended and brought up for examination, and may order him to be committed to the common gaol of the judicial district in which he resides for any term not exceeding twelve months.

<sup>8</sup> *Ex parte Official Receiver in re McGrath* (1890), 24 Q. B. D. 466; 7 Mor. 20; *In re Weinberg ex parte Official Receiver* (1907), 96 L. T. 790; 14 Mans. 277. Contrast the case of a subpoena which must be served personally: Rule 35.

<sup>7</sup> *In re Weinberg ex parte Official Receiver*, *supra*.

<sup>8</sup> Rule 134. Under *The Ontario Assignments and Preferences Act* service of a copy of the appointment and not of an original was sufficient: *In re Ferguson* (1908), 17 O. L. R. 576.

<sup>9</sup> *In re Ferguson*, *supra*.

<sup>10</sup> *In re Bradbrook ex parte Hawkins* (1889), 23 Q. B. D. 226; 58 L. J. Q. B. 442; 6 Mor. 188, and see Rule 132.

<sup>1</sup> *In re Geiger* (1913), 109 L. T. 224.

<sup>2</sup> *R. v. The Judge of The County Court of Surrey* (1884), 13 Q. B. D. 963; 53 L. J. Q. B. 545; see Rule 37.

<sup>3</sup> *Ex parte Lindsay in re Armstrong* (1892), 1 Q. B. 327; 8 Mor. 271.



apprehension and production for examination of any person liable to be examined who has not duly appeared. In view of the provisions of Rules 46 and 47, it would appear that the English Forms 147 and 148 of the 1915 Rules may be followed<sup>4</sup>.

Section 56

Form of  
warrant  
under 56(2).

In a flagrant case of refusal to disclose his property and transactions concerning his property, a debtor was committed under the Ontario Act for 9 months<sup>5</sup>.

Punishment  
under 56(2).

It seems that the allowances for witnesses set out in sections 89 to 91 of the tariff of costs may be recovered by action if not paid by the trustee<sup>6</sup>.

56(3) re-  
covery of  
conduct  
money and  
fee.

Section 56(4)(5)(6) is designed mainly to enable the trustee to obtain evidence by means of which he can recover property belonging to and debts owing to the debtor.

Sec. 56  
(4)(5)(6).  
machinery  
for the  
obtaining of  
of evidence.

Books, documents and papers of the debtor are "property of the debtor" which may be ordered to be delivered over to him or his trustee<sup>7</sup>. They must be distinguished from books, documents or papers relating in whole or in part to the debtor, his dealings or property<sup>8</sup>, which may consist of books, documents and papers belonging to some third person, or books, documents and papers which are the joint property of the debtor and a third person<sup>9</sup>. The trustee is entitled to all reasonable facilities for the inspection of books,

Books, docu-  
ments and  
papers men-  
tioned are  
not those of  
the debtor.

<sup>4</sup> The reason for the provision in Form 147 for the detention of the witness in custody appears in *In re Weinberg ex parte Official Receiver* (1907), 96 L. T. 790; 14 Mans. 277.

<sup>5</sup> *In re McLarty* (1908), 12 O. W. R. 1171.

<sup>6</sup> *Chamberlain v. Stoneham* (1889), 24 Q. B. D. 113; 59 L. J. Q. B. 95.

<sup>7</sup> Sections 56(4), 17(1), 6(3), 25. But books of the debtor other than books of account may be subject to a lien in favour of a third party; as may vouchers, counterfoils of cheques, correspondence and other papers. Rule 145; *Ex parte Godfrey in re Winslow* (1886), 16 Q. B. D. 696; 55 L. J. Q. B. 238; 3 Mor. 60. In such case the trustee is not entitled to demand possession, but he may call for production of the papers and other documents for his inspection: *In re Toleman and England ex parte Bramble* (1880), 13 Ch. D. 885. The trustee is not entitled to books of account which have ceased to be the property of the debtor; *Ex parte Good in re West* (1882), 21 Ch. D. 868; 51 L. J. Ch. 831.

<sup>8</sup> Sec. 56(4).

<sup>9</sup> The trustee is entitled under section 56(4) to the production of the mortgage deed of a secured creditor; nor is there any privilege against production on the ground that the mortgagee being a purchaser for value without notice cannot be compelled to discover his title deeds: *Ex parte Caldecott* (1830), Mont. 55.



**Section 56** documents or papers relating to the debtor, his dealings or property<sup>10</sup>. Section 56(6) appears to provide no penalty for failure to produce the required book, document or paper; but the court has jurisdiction under section 63 and Rules 40 and 41 to order the production of books, documents and papers relating to the debtor<sup>1</sup>. *Semble*, such jurisdiction is discretionary<sup>2</sup>.

Books must relate to debtor.

Under section 27 of *The English Act* of 1883, the trustee was required to establish a *prima facie* case that the books related to the debtor, his dealings or property<sup>3</sup>.

Clerk or servant may not be ordered to produce.

A clerk or servant who only has possession of or duties in connection with the books or property of the debtor in his capacity as clerk or servant, cannot be ordered to produce them, at least when his master is available and may be communicated with<sup>4</sup>, and has not been made a respondent to the application<sup>5</sup>.

Depositions to be placed on file.

The depositions made under section 56(5) should be placed on the file of the Bankruptcy Court immediately on being taken<sup>6</sup>.

Whether section 56 may be invoked under composition.

As to whether a trustee or creditors under a composition extension or scheme can take advantage of the provisions of section 56, see *In re Goldstein*<sup>7</sup>.

<sup>10</sup> *Ex parte Baker, Sutton & Co. in re Burnand* (1904), 2 K. B. 68; 73 L. J. K. B. 413; *In re Ash ex parte Hatt* (1913), 110 L. T. 48; 21 Mans. 15; 58 S. J. 174. During the course of the examination the documents may be ordered to be left in the custody of the court, but not of the trustee: *In re Ash ex parte Hatt, supra*.

<sup>1</sup> See *In re Geiger* (1913), 109 L. T. 224. For a form of appointment directing papers to be brought see *In re Century Manufacturing Co.* (1921), 1 C. B. R. 469 (Lamarre, R.).

<sup>2</sup> *Ex parte Tatton in re Thorp* (1881), 17 Ch. D. 512; 50 L. J. Ch. 792.

<sup>3</sup> *Ex parte Leigh in re Saunders* (1896), 13 T. L. R. 108.

<sup>4</sup> *In re Higgs ex parte Leicester* (1892), 66 L. T. 296; *In re Leighton* (1866), L. R. 1 Ch. 331; 35 L. J. Bank. 43.

<sup>5</sup> *In re Davis ex parte Goodman* (1898), 5 Mans. 329.

<sup>6</sup> *In re and ex parte Beall* (1894), 2 Q. B. 135; 63 L. J. Q. B. 425; 1 Mans. 203; Rule 9.

<sup>7</sup> (1917), 1 K. B. 558; *In re Grant ex parte Whinney* (1886), 17 Q. B. D. 238; 3 Mor. 118; *Ex parte Close in re Bennett* (1877), 5 Ch. D. 145; 46 L. J. Bank. 81; *In re Marks' Trust Deed* (1866), L. R. 1 Ch. 429, on section 197 of the Act of 1861, 24 and 25 Vict. c. 134. Compare section 13(15) of *The Bankruptcy Act*.



57. Where a receiving order is made against a debtor or where a debtor makes an authorized assignment, the court, on the application of the trustee, may from time to time order that for such time, not exceeding three months, as the court thinks fit, post letters, post packets and telegrams addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed, sent or delivered by the Postmaster-General or the officers acting under him, or by the various telegraph and cable systems, government and other, operating in Canada, or by the operators thereof, to the trustee, and the same shall be done accordingly. Section 58  
Re-direction  
of debtor's  
letters.

**Cross References Act:** Making of R. O. 4(5) ; of A. A., 9.

**Cross References Forms:** Order to Postmaster-General, 65.

**Analogous Legislation:** English Acts, 1914, s. 24 ; 1883, s. 26 ; 1869, s. 85.

It was held under the provisions of section 85 of *The English Bankruptcy Act* (1869), that the right to apply is confined to the trustee<sup>8</sup>. Form 65, which has been copied from the English form 140, does not apply to telegraph or cable systems.

### *Discharge of Bankrupt or Assignor.*

- 58 (1) Any debtor may, at any time after being adjudged bankrupt or making an authorized assignment, apply to the court for an order of discharge, to become effective not sooner than three months next after the date of his being adjudged bankrupt or of his making such assignment, and the court shall appoint a day for hearing the application. Application  
for discharge.
- (2) A bankrupt or authorized assignor intending to apply for his discharge shall produce Notice to  
creditors of  
hearing.

<sup>8</sup> *Ex parte Lister in re Halberstam* (1881), 17 Ch. D. 518.



Section 58

to the registrar of the court a certificate from the trustee specifying the names and addresses of his creditors of whom the trustee has notice (whether they have proved or not) and it shall be the duty of the trustee to furnish such certificate upon request therefor by the bankrupt or authorized assignor. The registrar shall, not less than twenty-eight days before the day appointed for hearing the application, give to the trustee notice of the application and of the time and place of the hearing of it, and the trustee shall not less than fourteen days before the day appointed for hearing the application give to each creditor who has proved his debt like notice.

Trustee to  
file report  
with  
registrar.

- (3) The trustee shall file with the registrar of the court, at least three days before the day appointed for hearing the application, his report as to the conduct and affairs of the bankrupt or assignor (including a report as to the conduct of the bankrupt or assignor during the proceedings under his bankruptcy or assignment). If the bankrupt or assignor has been examined, the trustee shall also file such examination, and shall report to the court any fact, matter or circumstance which would, under this Act, justify the court in refusing an unconditional order of discharge.

Court may  
grant or  
refuse  
discharge.

- (4) On the hearing of the application the court shall take into consideration the report of the trustee, and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or authorized assignor or with respect to his after-acquired property.



- (5) The court shall refuse the discharge in all cases where the bankrupt or authorized assignor has committed any offence under this Act or any offence connected with his bankruptcy or assignment or the proceedings thereunder, unless for special reasons the court otherwise determines, and shall on proof of any of the facts mentioned in the next succeeding section, either,—
- (a) refuse the discharge; or,
- (b) suspend the discharge for a period of not less than two years: provided that the period may be less than two years if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities; or,
- (c) suspend the discharge until a dividend of not less than fifty cents in the dollar has been paid to the creditors; or,
- (d) require the bankrupt or assignor, as a condition of his discharge, to consent to judgment being entered against him by the trustee for any balance or part of any balance of the debts provable under the bankruptcy or assignment which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt or assignor in such manner and subject to such conditions as the court may direct; but execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt or assignor has, since his discharge, acquired property or income available towards payment of his debts.

Section 58

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Powers of court to refuse, suspend or grant conditional discharge.

Provided that, if at any time after the expira-



## Section 58

tion of one year from the date of any order made under this section the bankrupt or assignor satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such order the court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

**Cross References Act:** Effect of discharge, 61, 60(3); facts on which discharge may be refused, suspended or granted conditionally, 59, 60(1)(7); proceedings on application for discharge, 60(2) to 60(6); annulment of adjudication, 62; bankruptcy offences, 89-96, and see sections 54 to 56; registrar may grant orders of discharge where unopposed, 62(2)(c); discharge defined, 2(p); powers of suspending and attaching conditions to discharge may be exercised concurrently, 60(6).

**Cross References Rules:** 135-144; opposed applications, 135(1).

**Cross References Forms:** Application for order of discharge, 66; notice to trustee of application for discharge, 67; notice to creditors of application for discharge, 68; order granting discharge unconditionally, 69; order refusing discharge, 70; order suspending discharge, 71; order of discharge where only facts proved that assets not equal to 50 cents on the dollar, 72; order of discharge subject to earnings, etc., 73; order of discharge subject to a condition requiring the bankrupt to consent to judgment being entered up against him, 74; consent of bankrupt to judgment being entered for balance or part of balance of provable debts, 75; judgment to be entered pursuant to consent, 76; affidavit by debtor as to after-acquired property, etc., 77; notice of discharge of bankrupt, 81.

**Analogous Legislation:** Canadian Acts, 1875, ss. 64, 65, 66; 1869, ss. 105, 108; English Act, 1914, s. 26 (1)(7)(2); English Rule 227.

## ANALYSIS OF NOTES.

Application for discharge.

Discretion under 58(4)(5) is a judicial discretion.

Discharge to be refused where bankrupt has committed an offence, etc.

Unless "special reasons" exist.

Court may consider facts which are not offences and not mentioned in section 59.

Rules to be followed where proof made of facts mentioned in section 59.

Suspension under 59(5)(c).

Discharge subject to consent to judgment.

Application for modification of terms of order.

Appeals.

Application  
for  
discharge.

A bankrupt who has applied for his discharge may be given leave to withdraw his application<sup>o</sup>. Delay in applying for a discharge will not justify a refusal

<sup>o</sup> *In re Wallis, ex parte Board of Trade* (1891), 60 L. J. Q. B. 455; 8 Mor. 110.



where there is no suggestion that the bankrupt was waiting until lapse of time had blotted out some evidence against him<sup>10</sup>. Section 58

The discretion exercised by the court under section 58(4)(5) is a judicial discretion. Therefore where all the facts have been brought to the attention of the court which has correctly<sup>1</sup> exercised its discretion<sup>2</sup> as to the terms on which a bankrupt is to obtain his discharge, such decision will not be interfered with on the allegation, *e.g.*, that the punishment was too lenient<sup>3</sup> or severe<sup>4</sup> unless it is clear that the decision was wrong<sup>5</sup>. If it is clear that the court has come to a wrong conclusion of fact with regard to the debtor's conduct<sup>6</sup>, or that the decision of the court was founded solely on the report of the trustee, the statements in which turn out to be unfounded or capable of explanation<sup>7</sup>, the order may be varied<sup>8</sup>. Discretion under 58(4), (5) is a judicial discretion.

Section 58(5) provides that the court shall refuse the discharge in all cases where the bankrupt or authorized assignor has committed<sup>9</sup> an offence under the Act<sup>10</sup>, or any offence connected with his bankruptcy, or assignment, or the proceedings thereunder<sup>1</sup>. It may be that the words "or any offence connected with his bankruptcy" include only offences which are *ejusdem generis* with "offences under the Act"<sup>2</sup>. It has been Discharge to be refused where bankrupt has committed an offence, etc.

<sup>10</sup> *In re Pearce* (1913), 107 L. T. 859.

<sup>1</sup> *In re and ex parte Rankin* (1887), 5 Mor. 23; *In re and ex parte Shackleton* (1889), 6 Mor. 304.

<sup>2</sup> *In re Shields* (1912), 106 L. T. 345; *In re Richards ex parte Evans* (1893), 10 Mor. 136.

<sup>3</sup> *In re Richards ex parte Evans* (1893), 10 Mor. 136.

<sup>4</sup> *In re and ex parte Swabey* (1897), 76 L. T. 534.

<sup>5</sup> *In re Chase ex parte Cooper* (1886), 3 Mor. 228.

<sup>6</sup> *Ex parte Castle Mail Packet Co. in re Payne* (1886), 18 Q. B. D. 154; 3 Mor. 270; *In re and ex parte Nicholas* (1890), 7 Mor. 54.

<sup>7</sup> *In re and ex parte Sultzberger* (1887), 4 Mor. 82; *Re Oswell ex parte Board of Trade* (1892), 9 Mor. 202.

<sup>8</sup> See further *In re and ex parte Freeman* (1890), 7 Mor. 38.

<sup>9</sup> See as to the meaning of "has committed," under the English Act of 1890; *In re Wood ex parte Leslie & Co., Ltd.* (1915), 1 H. B. R. 53.

<sup>10</sup> Bankruptcy offences are defined in sections 89 to 96.

<sup>1</sup> See sections 54 to 56.

<sup>2</sup> *Re Hedley ex parte Board of Trade* (1895), 1 Q. B. 923; 64 L. J. Q. B. 460; 2 Mans. 186. The phrase in *The Insolvent Act of 1869* was "or otherwise in any way contravened the provisions of this Act". *Hood v. Dodds* (1873), 19 Gr. 639. A registrar was held justified in suspending a discharge where the trustee had entered into an improper



## Section 58

said under the English section, which is not in all respects the same as 58(5), that there would be an offence connected with the bankruptcy if there were a conviction on facts which resulted in or brought about the debtor's insolvency; or if the facts upon which the conviction was based consisted in misconduct by the debtor either as a bankrupt, or in view of an impending bankruptcy<sup>3</sup>. Where a person has embezzled money from his employer and subsequently becomes bankrupt, and the employer proves in the bankruptcy, the embezzlement is not an offence connected with the bankruptcy merely by reason of the proof made by the employer<sup>4</sup>.

Unless  
"special  
reasons"  
exist.

Even though the debtor has committed an offence under the Act, the court may grant him his discharge where "special reasons" exist. But where there are "special reasons" it does not follow that the bankrupt is entitled to an immediate discharge without any period of probation<sup>5</sup>. If there are "special reasons" on which the court acts they must be stated in the order<sup>6</sup>. The facts that the debtor had been imprisoned for his offences and that these were the result more of confusion and distress than of deliberate fraudulent intent were held not to be "special reasons"<sup>7</sup>. As to whether good conduct of a bankrupt, after his discharge has been refused, is a special reason sufficient to support a renewal of his application, *quære*<sup>8</sup>.

In considering the question of a bankrupt's discharge, the court should have regard not only to the interests of the bankrupt and his creditors, but also to

arrangement with the debtor, and where the debtor was a party to the purchase of debts from the creditors under circumstances which showed that the creditors had not been placed upon an equal footing: *In re Shaw* (1917), 2 K. B. 734; 86 L. J. K. B. 1395.

<sup>3</sup> *In re Hedley ex parte Board of Trade*, *supra*.

<sup>4</sup> S. C.

<sup>5</sup> *In re Solomons* (1904), 1 K. B. 106; 73 L. J. K. B. 55; 10 Mans. 369.

<sup>6</sup> *In re Stevens ex parte Board of Trade* (1898), 2 Q. B. 495; 67 L. J. Q. B. 932; 5 Mans. 222; *In re and ex parte Nicholas* (1890), 7 Mor. 54.

<sup>7</sup> *In re Stevens ex parte Board of Trade*, *supra*.

<sup>8</sup> *In re and ex parte Smith* (1919), 88 L. J. K. B. 113; *In re Solomons* (1904), 1 K. B. 106; 73 L. J. K. B. 55; 10 Mans. 369; *In re Shields* (1912), 106 L. T. 345.



the interests of the public and of commercial morality<sup>9</sup> and may take into consideration conduct of the debtor and facts other than those set out in section 59, and those on proof of which the discharge must be refused<sup>10</sup>, provided they are in some way connected with the bankruptcy<sup>1</sup>. It is no ground on which to refuse or suspend the bankrupt's discharge that the bankrupt has refused to submit to a medical examination, which had been requested by the trustee, with a view to a policy being effected on his life<sup>2</sup>. Where the bankrupt is a solicitor, the court ought to be very careful in granting him his discharge<sup>3</sup>. It seems in England that where a debtor has only one unsecured creditor and files his own petition, the court will not consider this an act of misconduct which should be taken into consideration on an application for discharge, at least when both petition and adjudication were unchallenged<sup>4</sup>. While there appears to be nothing in the act to prevent an assignment by a person with no assets<sup>5</sup>, still if the assignment amounts to a fraudulent attempt by a person with no assets to accomplish his release by the assistance of an act of parliament, it may be that the court will take this fact into consideration when dealing with the application for a discharge<sup>6</sup>.

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Court may consider facts which are not offences and not mentioned in section 59.

<sup>9</sup> *In re and ex parte Badcock* (1886), 3 Mor. 138.

<sup>10</sup> *In re and ex parte Cook* (1889), 6 Mor. 224; *In re Barker ex parte Constable in re Jones* (1890), 25 Q. B. D. 285; 59 L. J. Q. B. 331; 7 Mor. 111; *In re and ex parte Badcock* (1886), 3 Mor. 138; *In re Shields* (1912), 106 L. T. 345.

<sup>1</sup> *In re Barker ex parte Constable in re Jones* (1890), 25 Q. B. D. 285; 59 L. J. Q. B. 331; 7 Mor. 111; *In re Brocklebank ex parte Dunn & Raeburn* (1889), 23 Q. B. D. 461; 58 L. J. Q. B. 375; 6 Mor. 138.

<sup>2</sup> *Board of Trade v. Block* (1888), 13 A. C. 570; 58 L. J. Q. B. 113.

<sup>3</sup> *In re Dalzell* (1909), 16 Mans. 203.

<sup>4</sup> *In re Bullen ex parte Arnaud* (1888), 5 Mor. 243.

<sup>5</sup> The policy of the older bankruptcy Acts was explicit. The Act of 1849 required the petitioner to state "Your petitioner verily believes that he can make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least 5s. in the pound," and the Act of 1854 contained the proviso "provided the debtor make it appear to the satisfaction of the court that his available estate is sufficient to produce the sum of £150 at the least." See *In re Newmark* (1862), 6 L. T. N. S. 755; *In re Thomas* (1868), 15 Gr. 196; *In re Perry* (1866), 2 U. C. L. J. N. S. 75.

<sup>6</sup> *Ex parte Morrison in re Clunn* (1864), 10 Jur. N. S. 787; *Thomas v. Hall* (1874), 6 P. R. 172; *Parke v. Day* (1875), 24 U. C. C. P. 619. An assignment under *The Insolvent Act* of 1875 passed not only what real and personal estate the insolvent then had, but also whatever



## Section 58

Rules to be followed where proof made of facts mentioned in section 59.

Where proof is made of any of the facts mentioned in section 59 (other than those in 59(a)), the court cannot grant an unconditional discharge<sup>7</sup> or suspend the discharge for any period less than the minimum of two years<sup>8</sup>. An order suspending a discharge may not incorporate both the conditions set out in 58(5)(b)(c)<sup>9</sup>. But it seems an order may be made refusing the discharge with liberty to apply for an immediate discharge on satisfying the court that in addition to the 10 shillings in the pound already paid, a further sum of 1 shilling in the pound has been paid<sup>10</sup>. Where the only facts proved are those mentioned in section 59, a bankrupt's discharge should only be refused in exceptional cases<sup>1</sup>, and suspension for five years should be reserved for very bad cases<sup>2</sup>, but suspension for three or six months is not as a general rule a sufficiently serious punishment<sup>3</sup>.

Suspension under 59(5) (c).

An order may not be made suspending a discharge until a dividend of 50 cents on the dollar has been paid to certain of the creditors<sup>4</sup>. Where an order of discharge was improperly conditioned on the payment of a dividend of 5 shillings in the pound instead of 10 shillings, but was acted on for five years, it was held that it must be treated as valid; but that a legacy which had become payable to the bankrupt and was

should in any way come to or devolve upon him before obtaining his discharge. *The Bankruptcy Act* is deficient in this last provision in the case of an assignment: see section 25.

<sup>7</sup> *In re Heap* (1887), 4 Mor. 314.

<sup>8</sup> *In re Oswald ex parte Board of Trade* (1892), 9 Mor. 202; under the Act of 1883 there was no minimum; *In re and ex parte Sultzberger* (1887), 4 Mor. 82.

<sup>9</sup> *In re Walmsley* (1908), 15 Mans. 342, when the order had been that the discharge should be suspended for three years and further payment of 10 shillings in the pound, but see *Re Dallmeyer* (1906), L. T. N. 543; (1906), L. J. N. C. 245, and compare *In re and ex parte Tregaskis* (1889), 6 Mor. 309.

<sup>10</sup> *In re and ex parte Tregaskis* (1890), 7 Mor. 193.

<sup>1</sup> *In re Pearse* (1913), 107 L. T. 859. Where it is evident that a bankrupt's knowledge of bookkeeping for example is such that he cannot properly inform himself of his position the court may instead of suspending the discharge, refuse it with liberty to the bankrupt to apply again at some future time and show that he has acquired the knowledge of which he was before deficient: *In re and ex parte Freeman* (1890), 7 Mor. 38, and see *In re and ex parte Tregaskis* (1890), 7 Mor. 193.

<sup>2</sup> *In re and ex parte Swabey* (1897), 76 L. T. 534.

<sup>3</sup> *In re and ex parte Freeman* (1890), 7 Mor. 38.

<sup>4</sup> See *In re Carne ex parte Jackson* (1889), 6 Mor. 55.



more than sufficient to pay the dividend of 5 shillings vested in the trustee. In that case it was held that the bankrupt was entitled to his discharge, but that the whole of the legacy was divisible among his creditors<sup>5</sup>. Where a bankrupt's discharge is opposed on the ground that the assets are not of sufficient value to pay a dividend of fifty cents on the dollar, the burden is on the opposing creditors to prove the insufficiency of the assets<sup>6</sup>.

The condition in 58(5)(d) is not merely a condition that the debtor shall consent to judgment; it is also a condition that he shall perform the conditions imposed on him by the court as to payment. If therefore the court is satisfied that the debtor has been in receipt of earnings or after-acquired property and has not devoted them to the purpose to which they ought to be applied, it may revoke the discharge under section 74<sup>7</sup>. Where a bankrupt refuses to give the consent required by 58(5)(d), the court may not on an application to have the order revoked, repeat its former order and refuse to make any further order, thus in effect suspending the discharge until the bankrupt consents to the condition<sup>8</sup>. Under 58(5)(d), the court is neither bound to enter judgment for the whole amount of the balance nor even for a sum sufficient to pay fifty cents on the dollar<sup>9</sup>. The "part of any balance" referred to in 58(5)(d) allows the exclusion of a part of the liability but not of some of the creditors<sup>10</sup>. Under the Act of 1883 which did not contain the words "such balance or any part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt", it was held that the court should only act under 58(5)(d) where there is a probability that the bankrupt may become possessed of

Section 58

Discharge  
subject to  
consent to  
judgment.

<sup>5</sup> *In re Hawkins ex parte O. R.* (1892), 1 Q. B. 890; 61 L. J. Q. B. 458; 9 Mor. 118.

<sup>6</sup> See *In re Van Laun ex parte The International Assets Co., Ltd.* (1908), 14 Mans. 281.

<sup>7</sup> *In re Summers ex parte O. R.* (1907), 2 K. B. 166; 76 L. J. K. B. 707; 14 Mans. 101.

<sup>8</sup> *In re Gaskell* (1904), 2 K. B. 478; 73 L. J. K. B. 656; 11 Mans. 125.

<sup>9</sup> *In re Richards ex parte Evans* (1893), 10 Mor. 136.

<sup>10</sup> S. C.



Section 58 after-acquired property<sup>1</sup>. It was decided under *The Bankruptcy Act* of 1883 that provisions similar to those contained in 58(5)(d) could not be incorporated in a scheme of arrangement, nor could the parties by consent give the court this jurisdiction which it did not otherwise possess<sup>2</sup>.

Application  
for modifica-  
tion of terms  
of order.

An application made under the proviso at the end of section 58 should be made by the bankrupt or assignor himself and not by the trustee. The fact that the bankrupt has not complied with rule 142 is no bar to his application<sup>3</sup>. It seems that in cases in which the conduct of the debtor has been creditable to him he will not be kept for an indefinite time subject to a conditional order of discharge, *e.g.*, to pay over any surplus of income to the trustee<sup>4</sup>.

Appeals.

Under section 74(2)(d) any person dissatisfied with the grant or refusal to grant a discharge may appeal from the order<sup>5</sup> where the aggregate of the unpaid claims of the creditors exceed five hundred dollars<sup>6</sup>. Where a bankrupt has appealed from a refusal to hear his application for discharge the appeal court will in a proper case hear and dispose of the application<sup>7</sup>. The court has jurisdiction on an appeal to order an undischarged bankrupt to pay costs<sup>8</sup>. It was held under the Act of 1883 that creditors who had been served with notice of an appeal by a bankrupt from an order granting him a conditional discharge would not be allowed their costs of appearing on the appeal when the official receiver or trustee appeared<sup>9</sup>.

<sup>1</sup> *In re Bullen ex parte Arnaud* (1888), 5 Mor. 243; *In re and ex parte Jones* (1890), 24 Q. B. D. 589; *In re and ex parte Gould* (1890), 63 L. T. 292; *In re and ex parte Gould* (1890), 7 Mor. 215; see further under the Act of 1883 *In re and ex parte James*, (1891), 8 Mor. 19; *In re and ex parte Shackleton* (1889), 6 Mor. 304.

<sup>2</sup> *In re Aylmer ex parte Bischoffsheim* (1887), 20 Q. B. D. 258; 57 L. J. Q. B. 168.

<sup>3</sup> *In re Roberts & Co., ex parte Bonzoline Manufacturing Co.* (1904), 2 K. B. 299; 73 L. J. K. B. 724; 11 Mans. 134.

<sup>4</sup> *In re Durnford* (1895), 2 Mans. 521. In this case the unconditional discharge was granted ten years after the date of the first order.

<sup>5</sup> See where no formal order had been drawn up: *In re Jones* (1868), 4 U. C. P. R. 317.

<sup>6</sup> See *Ex parte Castle Mail Packets Co. in re Payne* (1886), 18 Q. B. D. 154.

<sup>7</sup> *In re Jones*, *supra*

<sup>8</sup> *Ex parte Castle Mail Packets Co. in re Payne*, *supra*.

<sup>9</sup> *Ex parte Salaman* (1885), 14 Q. B. D. 936; 54 L. J. Q. B. 238; 2 Mor. 61.



59. The facts referred to in the next preceding section are,— Section 59

- (a) that the assets of the bankrupt or assignor are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;
- (b) that the bankrupt or assignor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or the making of the assignment;
- (c) that the bankrupt or assignor has continued to trade after knowing himself to be insolvent;
- (d) that the bankrupt or assignor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;
- (e) that the bankrupt or assignor has brought on, or contributed to, his bankruptcy or assignment by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;
- (f) that the bankrupt or assignor has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;
- (g) that the bankrupt or assignor has, within three months preceding the date of the receiving order or assignment, in-

Facts on which discharge may be refused, suspended or granted conditionally.



## Section 59

- curring unjustifiable expense by bringing a frivolous or vexatious action;
- (h) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, when unable to pay his debts as they became due, given an undue preference to any of his creditors;
- (i) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, incurred liabilities with a view of making his assets equal to fifty cents in the dollar on the amount of his unsecured liabilities;
- (j) that the bankrupt or assignor has, on any previous occasion, been adjudged bankrupt or has made an authorized assignment or made a composition, extension or arrangement with his creditors;
- (k) that the bankrupt or assignor has been guilty of any fraud or fraudulent breach of trust.

**Cross References Act:** When assets are deemed equal to fifty cents on the dollar, 60(1); bankrupt failing to keep proper books of account, 91(1) (2).

**Analogous Legislation:** English Act, 1914, s. 26(3).

## ANALYSIS OF NOTES.

Court may consider facts occurring before the Act come into force.  
 Burden of proof.  
 Assets not equal to fifty cents on the dollar.  
 Books of account.  
 Continuing to trade.  
 Rash and hazardous speculation.  
 Unjustifiable extravagance in living.  
 Vexatious defence.  
 Undue preference.

Court may consider facts occurring before Act came into force.

When the court takes into consideration any of the facts set out in section 59, it is not limited to facts which have occurred subsequently to the coming into operation of *The Bankruptcy Act*, but may consider those which have taken place before that date<sup>10</sup>.

<sup>10</sup> *In re and ex parte Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159; *In re and ex parte Salaman* (1885), 14 Q. B. D. 936; 54 L. J. Q. B.



The burden of proving that the assets are not of a value equal to fifty cents on the dollar is on the opposing creditors<sup>1</sup>; as is that of proving either that there were no books of account or that they were defective in some respect<sup>2</sup>. Section 59  
Burden of proof.

Section 61(1) provides that in certain circumstances the assets of the bankrupt or assignor shall be deemed of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities<sup>3</sup>. Assets not equal to fifty cents on the dollar.

The books which are required to be kept are books with respect to the business which the debtor carries on: not with respect to a speculation, not amounting to a business<sup>4</sup> into which he enters<sup>5</sup>. Where the business is one in which it is not usual to keep books none need be kept<sup>6</sup>. The books must be properly kept and balanced from time to time<sup>7</sup> and should show at once without the necessity of a prolonged investigation by a skilled accountant the state of the debtor's business<sup>8</sup>. The expression "financial position" does not mean a man's "financial position *aliunde*", but his "financial position with regard to the business which is carried on by him"<sup>9</sup>. Under sections 56 and 57 of *The Insolvent Act* of 1875 the court was compelled to refuse a discharge if the debtor had failed to keep a cash book Books of account.

238; 2 Mor. 61; *Ex parte Durnford* (1851), 4 DeG. & S. 29; 29 L. J. B. 27; *Ex parte Staner*, 2 D. M. & G. 263, 267, contrast *In re White* (1863), 9 L. T. N. S. 702.

<sup>1</sup> *In re Van Laun ex parte The International Assets Co., Ltd.* (1908), 14 Mans. 281.

<sup>2</sup> *In re Russell* (1882), 7 O. A. R. 777.

<sup>3</sup> And see *In re Galbraith v. Christie* (1880), 5 O. A. R. 358, as to circumstances for which the debtor cannot be held responsible.

<sup>4</sup> *In re Griffin ex parte Board of Trade* (1890), 60 L. J. Q. B. 235; 8 Mor. 1, but if it does amount to a business books must be kept: *In re and ex parte Carter* (1850), 1 Fonb. 83.

<sup>5</sup> *In re Mutton ex parte Board of Trade* (1887), 19 Q. B. D. 102; 56 L. J. Q. B. 395; 4 Mor. 180.

<sup>6</sup> S. C.

<sup>7</sup> *In re Smart* (1849), 1 Fonb. 14.

<sup>8</sup> *Ex parte Reed & Bowen* (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 3 Mor. 90; see under the Act of 1875 *In re Hill* (1882), 7 O. A. R. 694, 701. See as to account book *In re Sullivan* (1869), 5 C. L. J. 71; ledger, *In re Tracey* (1849), 1 Fonb. 13; cash book, *In re Sparrow* (1850), 1 Fonb. 69, and see generally *In re Heap and ex parte Board of Trade* (1887), 4 Mor. 314; *In re and ex parte Freeman* (1890), 7 Mor. 38, 48.

<sup>9</sup> *Per Lopes, L.J., In re Mutton ex parte Board of Trade, supra*, at p. 109.



## Section 59

Continuing  
to trade.Rash and  
hazardous  
speculation.

and accounts suitable for his trade; though where he had kept books, but had been negligent in keeping them, the court might suspend his discharge.<sup>10</sup>

While a man has a right to go on with a business although it may be a losing business, on the other hand when he becomes insolvent he may not go on trading in the hope that he will be able to retrieve his position<sup>1</sup>.

Although a definition of what was not a rash and hazardous speculation within the Act of 1861 was attempted by Westbury, L.J.<sup>2</sup>, the courts have shown a preference in favour of deciding each case on its special facts<sup>3</sup>. The term rash and hazardous speculations is not confined to speculations in trade. It includes other speculations such as gambling and betting and stock market transactions<sup>4</sup>, but the business of a stockbroker is not itself a speculation within the section<sup>5</sup>. Nor is it necessarily a rash and hazardous speculation for a person to take up a business which he does not understand<sup>6</sup>. It has, however, been held in England that it is rash within the meaning of the section for a solicitor whose business requires all his attention to enter into a land speculation which might land him in indefinite loss<sup>7</sup>. It may be rash and hazardous speculation for a trader who is owed a large sum to endeavour to keep his debtor afloat and continually to increase the debt in his favour<sup>8</sup>.

<sup>10</sup> *In re Gooding* (1880), 5 O. A. R. 643. As to the weight to be given to the fact that the omission to keep books was not due to any fraudulent intent, see *In re Bullivant* (1880), 5 O. A. R. 638.

<sup>1</sup> *In re Stainton ex parte Board of Trade* (1887), 19 Q. B. D. 182; 4 Mor. 242, compare *In re Holt* (1867), 13 Gr. 568.

<sup>2</sup> *In re and ex parte Downman* (1863), 32 L. J. Bank. 49.

<sup>3</sup> *In re Keays* (1891), 9 Mor. 18; *In re and ex parte Young* (1885). 2 Mor. 37. See as to a speculation in land and building, *In re and ex parte Salaman* (1885), 14 Q. B. D. 936; 54 L. J. Q. B. 238; 2 Mor. 61; *In re Keays*, *supra*; and the advancement of money to a mining company whose properties had not been developed, *In re and ex parte Young*, *supra*; all of which were held to be within the section.

<sup>4</sup> *In re Barlow ex parte Thornber* (1886), 3 Mor. 304; *In re and ex parte Rankin* (1887), 5 Mor. 23; *In re Stainton ex parte Board of Trade* (1887), 19 Q. B. D. 182; 4 Mor. 242; *cf. In re Jones* (1868), 4 P. R. 317.

<sup>5</sup> *In re and ex parte Jenkins* (1891), 8 Mor. 36; *cf. In re Wilson* (1866), 14 L. T. 492.

<sup>6</sup> *In re Nicholas* (1890), 7 Mor. 54.

<sup>7</sup> *In re Keays* (1891), 9 Mor. 18; *In re and ex parte Salaman* (1885), 14 Q. B. D. 936; 54 L. J. Q. B. 238; 2 Mor. 61.

<sup>8</sup> *In re and ex parte Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159.



When a man's earnings are no longer sufficient to support his usual style of living he will not be excused for not reducing his expenditure by the plea that it was necessary to keep up appearances<sup>9</sup>.

Section 60  
Unjustifiable  
extrava-  
gance in  
living.

For cases illustrating what may constitute a vexatious defence, see *In re and ex parte Johnson*<sup>10</sup> *Re Pownall*<sup>1</sup> and *In re and ex parte Blackhurst*<sup>2</sup>.

Vexatious  
defence.

Undue preference in 59(h) has been interpreted to mean an interference by the debtor in any way in order to give an advantage, or, possibly, what he thinks is an advantage<sup>3</sup> to one of his creditors over the others<sup>4</sup>. Consequently there may be an undue preference even though the transaction does not amount to a fraudulent preference under section 31<sup>5</sup>.

Undue  
preference.

60 (1) For the purposes of the preceding section the assets of a bankrupt or authorized assignor shall be deemed of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt or assignor has realized, or is likely to realize, or with due care in realization, might have realized an amount equal to fifty cents in the dollar on his unsecured liabilities, and a report by the trustee shall be *prima facie* evidence of the amount of such liabilities.

Assets of  
debtor when  
deemed equal  
to fifty cents  
on dollar.

(2) For the purposes of this and the next preceding sections the report of the trustee

Report of  
trustee  
*prima facie*  
evidence.

<sup>9</sup> *In re Stainton ex parte Board of Trade*, *supra*; *In re Stevens* (1863), 7 L. T. 649; *In re and ex parte Sparham* (1864), 9 L. T. 548; and see *In re Barlow ex parte Thorner*, *supra*; *In re and ex parte Ryley* (1866), 14 L. T. 707.

<sup>10</sup> (1851), 4 DeG. & S. 25; 20 L. J. Bank. 6.

<sup>1</sup> (1851), 1 Fonb. 221.

<sup>2</sup> (1858), 3 DeG. & J. 39; 27 L. J. Bank. 24.

<sup>3</sup> *In re and ex parte Bryant* (1895), 1 Q. B. 420; 64 L. J. Q. B. 417; 2 Mans. 37.

<sup>4</sup> *Per Esher, L.J.*, *In re and ex parte Skegg*, 63 L. T. 90; *In re Jones* (1868), 4 P. R. 317.

<sup>5</sup> *Per Lindley, L.J.*, in *In re and ex parte Skegg*, *supra*; *cf. In re Russell* (1882), 7 O. A. R. 777.



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Section 60

Court may  
grant  
certificate.

shall be *prima facie* evidence of the statements therein contained.

Examination  
of debtor  
may be read.

(3) Any statutory disqualification on account of bankruptcy shall cease if and when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part. The court may, if it thinks fit, grant such a certificate, and a refusal to grant such a certificate shall be subject to appeal.

Counsel.

(4) At the hearing of the application, the court may read the examination of the bankrupt or assignor, and may put such further questions to him and receive such evidence as it may think fit.

Power to  
suspend.

(5) The trustee, the debtor and any creditor may attend and be heard in person or by counsel.

(6) The powers of suspending and of attaching conditions to the discharge of a bankrupt or authorized assignor may be exercised concurrently.

Fraudulent  
settlements.

(7) In either of the following cases, that is to say:—

(a) In the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or,

(b) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

if the settlor is adjudged bankrupt or makes an authorized assignment or compounds or



arranges with his creditors, and it appears to the court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge or grant an order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud. Section 60

**Cross References Act:** Application for discharge, 58; facts on which discharge may be refused, suspended or granted conditionally, 59; examination of debtor, 56; avoidance of certain settlements and marriage contracts, 29; appeals, 74(2) (d).

**Cross References Rules:** 135-144. Matters to be heard in chambers, 4; and by motion, 14.

**Cross Reference Forms:** Certificate of removal of disqualification, 80.

**Analogous Legislation:** English Act, 1914, ss. 26(5) (6) (4) (7) (8), 27.

There is a statutory disqualification in section 31 60(3) of *The British North America Act* which reads:— statutory disqualifications

“31. The place of a Senator shall become vacant in any of the following cases:—

3. If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter.”

Section 60(6) of *The Bankruptcy Act* was passed Sec. 60(6). to do away with the decision in *In re Huggins*<sup>6</sup>, which held that the court had no power under the section corresponding with 58(4) to make an order of discharge conditional and also to suspend its operation<sup>7</sup>.

It was held under *The Insolvent Act* 1875 that the fact that an insolvent had made a post-nuptial settlement upon his wife at a time when he was not aware of his inability to meet his liabilities was no ground for refusing his discharge<sup>8</sup>. Sec. 60(7).

<sup>6</sup> (1889); 22 Q. B. D. 277; 58 L. J. Q. B. 207; 6 Mor. 38.

<sup>7</sup> See for a case where the provisions of 60(6) were acted on: *In re and ex parte Dallmeyer* (1906), 22 T. L. R. 445; and see notes to section 58.

<sup>8</sup> *In re Russell* (1882), 7 O. A. R. 777.



## Section 61

Debts not  
released by  
order of  
discharge.

61 (1) An order of discharge shall not release the bankrupt or authorized assignor,—

(a) from any debt on a recognizance nor from any debt with which the bankrupt or assignor may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, and he shall not be discharged from such excepted debts unless an order in council proceeding from the Crown in the proper right is filed in court consenting to his being discharged therefrom; or,

(b) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or,

(c) from any liability under a judgment against him in an action for seduction, or under an affiliation order, or for alimony or under a judgment against him as a co-respondent in a matrimonial case, except to such an extent and under such conditions as the court expressly orders in respect of such liability; or,

(d) from any debt or liability for necessities of life, and the court may make such order for payment thereof as it deems just or expedient.

Debts  
released.

(2) An order of discharge shall release the bankrupt or assignor from all other debts provable in bankruptcy or under an authorized assignment.

Partner or  
co-trustee  
not released.

(3) An order of discharge shall not release any person who at the date of the receiving



order or assignment was a partner or co-trustee with the bankrupt or authorized assignor or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him. Section 61

- (4) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge. Evidence.
- (5) Notice of the order of discharge of a bankrupt or authorized assignor shall be forthwith gazetted. Notice of discharge.

**Cross References Act:** Debts provable, 44; application for discharge, 58; facts on which discharge may be refused, 59; procedure on application, 60; statutory disqualification to cease, 60(3); annulment of adjudication, 62; gazetted defined, 2(*g*); discharge defined, 2(*p*); discharge in composition proceedings, 13(12)(19); alimentary debt defined, 2(*b*); effect of a discharge in binding the Crown, 86; formal defects, 84; sealed copy of order is receivable in all legal proceedings, 78; a discharge does not release from criminal liability, 94.

**Cross References Rules:** Rules relating to discharge, 135-144.

**Cross References Forms:** Notice of discharge of bankrupt, 81; and see Rules 66-80.

**Analogous Legislation:** Canadian Acts, 1875, ss. 61, 62, 63, 66; 1869, ss. 98, 99, 100, 108; English Acts, 1914, s. 28; 1883, s. 30.

#### ANALYSIS OF NOTES.

Differences between *The Insolvent Acts* and *The Bankruptcy Act*—

(a) Where claims not scheduled.

(b) Discharge now voidable not void.

Discharge conclusive evidence until set aside.

Debtor liable for balance of debt in certain cases.

Effect of discharge on license to seize or covenant to assure.

Discharge does not affect liability to criminal arrest.

Discharge ineffective unless trustee has assumed duties.

Foreign discharge.

Property received by debtor after discharge.

Cases within 61(1)(b).

Promise after discharge to pay barred debt.

Promise made during composition proceedings to pay debt in full.



## Section 61

Differences  
between the  
Insolvent  
Acts and  
*The Bank-  
ruptcy Act*  
(a) where  
claims not  
scheduled.

Under *The Insolvent Acts* of 1864, 1869 and 1875 in order that the discharge might bar a creditor's claim, the claim must in some way have been set out in the schedule or supplementary list of creditors furnished to the assignee<sup>9</sup>. The policy of *The Bankruptcy Act* is different. Section 61 indicates the debts from which the debtor shall not be released, and then provides that the order shall discharge the debtor from "all other debts provable in bankruptcy."

(b)  
Discharge  
now voidable  
not void.

Under the *Insolvent Acts* of 1864 and 1875, it was provided that every discharge or composition or confirmation of any discharge or composition which had been obtained by fraud "shall be null and void." Under these Acts two lines of cases were developed (1) those in which the fraud was specifically mentioned in the Act and (2) those in which the fraud was not so mentioned. In the former it was held that the discharge was void, the proceedings being wholly a nullity and *coram non judice*. Accordingly the discharge could be impeached when it was set up as a defence to an action by a creditor for his debt<sup>10</sup>. In the second class of cases the discharge if voidable on application to the Bankruptcy Court could not be attacked in a suit at law<sup>1</sup>.

Discharge  
conclusive  
evidence  
until set  
aside.

There is no provision in *The Bankruptcy Act* making the discharge null and void. The order of discharge is accordingly by section 61(4) conclusive evi-

<sup>9</sup> *King v. Smith* (1869), 19 U. C. C. P. 319; *Palmer v. Baker* (1871), 22 U. C. C. P. 59; *Cameron v. Holland* (1869), 29 U. C. Q. B. 506; *Farrell v. O'Neill* (1871), 22 U. C. C. P. 31; *Preston v. Hunton* (1875), 37 U. C. Q. B. 177; *Robson v. Warren* (1870), 6 C. L. J. N. S. 14. These cases are reviewed in *Standard v. Johnson* (1877), 24 U. C. Q. B. 66.

<sup>10</sup> *Thompson v. Rutherford* (1868), 27 U. C. Q. B. 205; *McMaster v. King* (1878), 3 O. A. R. 106; *Godkin v. Beech* (1876), 10 N. S. R. 261. Fraudulent concealment of assets was such a fraud: *McLean v. McLellan* (1870), 29 U. C. Q. B. 548; *McGee v. Campbell* (1882), 2 O. R. 130; *Golloghy v. Graham* (1872), 22 U. C. C. P. 226. As to priorities between creditors when a discharge is set aside see *Buchanan v. Smith* (1870), 17 Gr. 208.

<sup>1</sup> *Parke v. Day* (1875), 24 U. C. C. P. 619; *Forrester v. Thrasher* (1882), 2 O. R. 38, in effect overruling *Thomas v. Hall* (1874), 6 P. R. 172, on this point. See for a review of the policy under the old English Bankruptcy laws: *Groves v. McArdle* (1873) 33 U. C. Q. B. 252. See as to avoidance of discharge where no advertisement: *Nicholson v. Gunn* (1874), 35 U. C. Q. B. 7.



dence in all other courts as well as in the Bankruptcy Court of the bankruptcy and of the validity of the proceedings therein. The course of any one complaining against an order of discharge is to apply to the Bankruptcy Court to set it aside. It cannot remain in existence and be contested in an action to which it is set up as a defence<sup>2</sup>. Apart from the effect given by the statute to the order of discharge, the creditor or surety<sup>3</sup> may in some cases be estopped from claiming against the debtor<sup>4</sup>.

An order of discharge releases a bankrupt or assignor from all debts provable in bankruptcy or under the authorized assignment except those set out in section 61(1). The result will be that as regards debts which are mentioned in 61(1) and provable in the bankruptcy, the debtor will after his discharge be liable for the balance due on the debt. In cases to which the discharge of the bankrupt is no defence, the court will not restrain the creditor from proceeding to judgment even during the pendency of the bankruptcy<sup>5</sup>, but the judgment cannot be enforced during the bankruptcy<sup>6</sup>,

Debtor  
liable for  
balance of  
debt in cer-  
tain cases.

<sup>2</sup> *Lewis v. Leonard* (1880), 5 Ex. D. 165; 49 L. J. Ex. 308; *Elmslie v. Corrie* (1878), 4 Q. B. D. 295; 48 L. J. Q. B. 462; *Wadsworth v. Pickles* (1880), 5 Q. B. D. 470; 49 L. J. Q. B. 454; section 127 of the English Act of 1869, provided that "The registration by the registrar of a special resolution of creditors on the occasion of a liquidation by arrangement under Part Six of this Act, or of an extraordinary resolution of the creditors on the occasion of a composition under the Seventh Part of this Act, shall, in the absence of fraud, be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this Act in respect of such resolutions complied with." It has been held under this section that although the existence of fraud may be very good ground for an application to the court to place the parties *in statu quo*, yet so long as the registration stands it will be an answer to an action by any creditor under the liquidation; and this although the name of the plaintiff had been fraudulently omitted by the debtor from the list of creditors delivered to the registrar: *Wadsworth v. Pickles* (1880), 5 Q. B. D. 470; 49 L. J. Q. B. 454; cf. *Heather v. Webb* (1876), 2 C. P. D. 1; 46 L. J. C. P. 89.

<sup>3</sup> *Martin v. Brumell & Richardson* (1868), 4 P. R. 229; 4 U. C. L. J. N. S. 137.

<sup>4</sup> See *McLean v. McLellan* (1870), 29 U. C. Q. B. 548; *Fowler v. Perrin* (1866), 16 U. C. C. P. 258.

<sup>5</sup> *Ex parte Coker in re Blake* (1875), L. R. 10 Ch. 652; 44 L. J. Bank. 126; *Ex parte Hemming in re Chatterton* (1879), 13 Ch. D. 163; 49 L. J. Bank. 17.

<sup>6</sup> *Cobham v. Dalton* (1875), L. R. 10 Ch. 655; 44 L. J. Ch. 702; *Ross v. Gutteridge* (1883), 52 L. J. Ch. 280; and see sections 6(1) and 7.



**Section 61** although proof may be made for the amount of the debt, where it is provable<sup>7</sup>, and dividends may be received. Where the creditor receives dividends in the bankruptcy in respect of the debt, the debtor will only remain liable for the unpaid balance of the debt<sup>8</sup>.

Effect of discharge on license to seize or covenant to assure.

Where a license to seize after-acquired goods is given a creditor so that he may be able to satisfy his debt, and thereafter the debtor becomes bankrupt and obtains his discharge, the debt being gone the collateral license to seize goes with it<sup>9</sup>; but where instead of a mere license to seize there is a covenant, of which specific performance would be ordered, to transfer or charge after-acquired property, or anything amounting to an equitable mortgage, the result will be different<sup>10</sup>.

Discharge does not affect liability to criminal arrest.

A debtor under arrest for non-payment of a sum of money is not entitled to his release from arrest by reason of the fact that he has obtained his discharge in bankruptcy, if the arrest is in the nature of criminal process.<sup>1</sup>

Discharge ineffective unless trustee has assumed duties.

It was held under *The Insolvent Act* of 1864 that where there had been a voluntary assignment to an official assignee who had refused to accept it, a discharge obtained by the insolvent could have no effect<sup>2</sup>.

Foreign discharge.

The effect which is given in English law to foreign bankruptcies, using the word "foreign" in a restricted sense, has recently been stated by Eve, J.,<sup>3</sup> as follows:

<sup>7</sup> *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122; 50 L. J. Ch. 449; *Hale v. Boustead* (1881), 8 Q. B. D. 453; 51 L. J. Q. B. 255; *Jack v. Kipping* (1882), 9 Q. B. D. 113; 51 L. J. Q. B. 463.

<sup>8</sup> *Ex parte Hemming in re Chatterton* (1879), 13 Ch. D. 163; 49 L. J. Bank. 17.

<sup>9</sup> *Thompson v. Cohen* (1872), L. R. 7 Q. B. 527, 533; 41 L. J. Q. B. 221.

<sup>10</sup> *In re Lind, Industrials Finance Syndicate v. Lind* (1915), 1 H. B. R. 204; *Lyde v. Mynn* (1833), 4 Sim. 505; 1 My. & K. 683; *Hobroyd v. Marshall* (1862), 10 H. L. C. 191; 33 L. J. Ch. 193.

<sup>1</sup> *Ex parte Graves in re Prince* (1868), L. R. 3 Ch. 642; *Bancroft v. Mitchell* (1867), L. R. 2 Q. B. 549; 36 L. J. Q. B. 257; see as to judgment summons: *Copeman v. Rose* (1857), 7 E. & B. 679; *Abley v. Dale* (1851), 11 C. B. 378; *Ex parte Christia*, 4 E. & B. 714; *George v. Somers* (1855), 16 C. B. 539; *MacKay v. Goodson* (1868), 27 U. C. Q. B. 263.

<sup>2</sup> *Becker v. Blackburn*, 23 U. C. C. P. 207, following *Yarrington v. Lyon* (1866), 12 Gr. 308.

<sup>3</sup> *In re Nelson, ex parte Dare and Dolphin* (1918), 1 K. B. 459; 87 L. J. K. B. 628; (1918-19) B. & C. R. 1 (C.A.).



“Where the effect of the foreign bankruptcy is to divest the debtor of the whole of his property, wherever situate, and to vest it in the assignee for distribution, amongst all his creditors, wherever resident, the Courts in this country give the same effect to the order or instrument discharging the debtors in the bankruptcy as is given to it in the country where the bankruptcy occurs<sup>4</sup>.” It follows that where there is no compulsory divesting as in composition proceedings,<sup>5</sup> or in winding up proceedings,<sup>6</sup> an English debtor who has not proved in composition or winding up proceedings in another jurisdiction is not precluded by a winding-up order or by a certificate of conformity given by the foreign court from pursuing his remedies in an English Court<sup>7</sup>. Such certificate or order is, of course, an answer in the court which gave it to an action in that court on a judgment obtained abroad<sup>8</sup>. What is a discharge of a debt in the country where it was contracted and to be performed, is a discharge everywhere and recognized as such by the comity of nations<sup>9</sup>.

Section 61

Even in cases not falling within section 58(5)(d), it does not necessarily follow that where a debtor has obtained his discharge, property which comes to him thereafter is his to dispose of. Where for example a debtor during his bankruptcy, without the knowledge of the trustee, effects an insurance on his life and pays the premiums out of moneys allowed to him by the

Property  
received by  
debtor after  
discharge.

<sup>4</sup> See *In re Eades Estate*, 33 D. L. R. 335, 348; *Ferguson v Spencer* (1840), 10 L. J. C. P. 20; 1 Man. & G. 987; *Armani v Castrique* (1844), 13 M. & W. 443, 447; 14 L. J. Ex. 36, 38; *Sidaway v Hay* (1824), 2 L. J. (O. S.) K. B. 215; 3 B. & C. 12; *Simpson v. Miravita* (or *Mirabita*) (1869), L. R. 4 Q. B. 287; 38 L. J. Q. B. 76; *Phillips v. Allen* (1828), 8 B. & C. 477; *Ellis v. McHenry*, L. R. 6 C. P. 228; 40 L. J. C. P. 109. Distinguish *Gibbs & Sons v. La Societe, etc. des Metaux* (1890), 25 Q. B. D. 399; 59 L. J. Q. B. 510; *Bartley v. Hodges* (1861), 30 L. J. Q. B. 352; 1 B. & S. 375; *Smith v. Buchanan* (1800), 1 East. 6.

<sup>5</sup> *In re Nelson, ex parte Dare and Dolphin*, *supra*.

<sup>6</sup> Where the property remains vested in title and in fact in the company, subject to its being administered by the court: *New Zealand Loan and Mercantile Agency Co. v. Morrison* (1898), A. C. 349, 358; 67 L. J. P. C. 10.

<sup>7</sup> *In re Nelson, ex parte Dare and Dolphin*, *supra*.

<sup>8</sup> *Ellis v. McHenry* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 228; *In re Nelson, ex parte Dare and Dolphin*, *supra*.

<sup>9</sup> *Potter v. Brown* (1804), 5 East. 124; *International Harvester Co. v. Zarbok*, 11 S. L. R. 354.



**Section 61** trustee as salary and then obtains his discharge, the official receiver in England is entitled to the policy when it falls in<sup>10</sup>. The same principle applies where the policy was effected before the liquidation, the policy being concealed from the trustee<sup>11</sup>. Nor does it make any difference that the discharged bankrupt continues to pay the policies after his discharge<sup>12</sup>. The result would be different if the trustee is cognizant and acquiesces in what is done<sup>13</sup>.

Cases within  
61(1) (b).

With reference to cases falling within section 61(1) (b), it has been decided that where an attorney brings an action without any authority from his client and is ordered to pay the costs, his liability is one incurred by means of a fraud from which a discharge will not release him<sup>1</sup>. But where an action has been brought with respect to a breach of trust and the defendant has been ordered to pay the costs of the action, though incurred as consequential upon the breach of trust they are not a "debt or liability incurred by means of any fraudulent breach of trust"<sup>2</sup>. A financial agent who receives from the vendors of a mine a portion of the purchase money without the knowledge of the company for which he is acting is guilty of a "fraud" and also a "breach of trust"<sup>3</sup>. The word "fraud" is not confined to a fraud committed by the bankrupt personally. Therefore where a debt has been incurred by one of several partners for which the partnership is liable, and the partnership goes into liquidation and an innocent partner receives his discharge, he is not thereby released from the debt<sup>4</sup>.

Promise  
after dis-  
charge to pay  
barred debt.

In England under the Acts of 1849 and 1861, no action might be brought on either a verbal or written promise to pay a debt discharged by a certificate.

<sup>10</sup> *In re Stokes ex parte Mellish* (1919), 2 K. B. 256. See notes to section 25.

<sup>11</sup> *Tapster v. Ward* (1909), 101 L. T. 25, 503.

<sup>12</sup> *In re Stokes ex parte Mellish*, *supra*; *Tapster v. Ward*, *supra*.

<sup>13</sup> *In re Tyler* (1907), 1 K. B. 865; *In re Hall* (1907), 1 K. B. 875.

<sup>1</sup> *Jenkins v. Fereday* (1871), L. R. 7 C. P. 358.

<sup>2</sup> *In re Greer, Napper v. Fanshawe* (1895), 2 Ch. 217; 64 L. J. Ch. 620; 6 Mans. 42.

<sup>3</sup> *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122; 50 L. J. Ch. 449.

<sup>4</sup> *Cooper v. Pritchard* (1883), 11 Q. B. D. 351; 52 L. J. Q. B. 526.



These provisions were repealed by the Act of 1869, Section 62  
 and it was held under that Act that<sup>5</sup> a mere promise to pay a debt barred by a certificate of discharge is *nudum pactum*, being without consideration<sup>6</sup>. A different conclusion has been come to by the Court of Appeal in Ontario on the provisions of *The Insolvent Act* of 1875<sup>7</sup>. A promise made after discharge to pay such a debt is good if supported by a new and valuable consideration<sup>8</sup>, or if there is a new contract which is enforceable by the *lex loci contractus*<sup>9</sup>, provided there is no fraud<sup>10</sup>.

Such a case must be distinguished from that arising when a creditor who is a party to composition proceedings and bound by them enters into an agreement with his debtor before his discharge for payment of his debt in full. Such an agreement, though made for good consideration, is invalid as being a fraud on the other creditors<sup>1</sup>.

Promise made during composition proceedings to pay debt in full.

62 (1) Where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on

Power of court to annul adjudication.

<sup>5</sup> For history of the legislation see *per Kelly, C.B.*, in *Jakeman v. Cook* (1878), 4 Ex. D. 26. These old provisions may be important in certain of the provinces.

<sup>6</sup> *Heather v. Webb* (1876), 2 C. P. D. 1; 46 L.J. C. P. 89; *Jakeman v. Cook* (1878), 4 Ex. D. 26; 41 L. J. Ex. 165.

<sup>7</sup> *Adams v. Woodland* (1878), 3 O. A. R. 213, and see *Austin v. Gordon* (1872), 32 U. C. Q. B. 621, which was observed on in *Samuel v. Fairgrieve* (1894), 21 O. A. R. 418, 425. No observation was made on the decision in *Adams v. Woodland*, *supra*, although that case was cited in argument in *Samuel v. Fairgrieve*.

<sup>8</sup> *Jakeman v. Cook* (1878), 4 Ex. D. 26; 41 L. J. Ex. 165; *In re Aylmer ex parte Crane* (1894), 1 Mans. 391; *In re Bonacina Le Brasseur v. Bonacina* (1912), 2 Ch. 394; 81 L. J. Ch. 674; 19 Mans. 224; *Wild v. Tucker* (1914), 3 K. B. 36; 83 L. J. K. B. 1410; 21 Mans. 181.

<sup>9</sup> As may be the case under Italian law by a mere promise to pay and the execution of a *privata scrittura*, *In re Bonacina Le Brasseur v. Bonacina*, *supra*.

<sup>10</sup> *In re Gommersall ex parte Gordon* (1875), 1 Ch. D. 137; 45 L. J. Bank. 1.

<sup>1</sup> *Ex parte Barrow in re Andrews* (1881), 18 Ch. D. 464; 50 L. J. Ch. 821; *Wild v. Tucker* (1914), 3 K. B. 36; 83 L. J. K. B. 1410; 21 Mans. 181.



**Section 62**Effect of  
annulment.

the application of any person interested, by order annul the adjudication.

- (2) Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done by the trustee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order.

Notice.

- (3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper.

Filing bond  
or payment  
into court,  
satisfaction  
of debt.

- (4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

**Cross References Act:** Court may adjudge debtor bankrupt, 4(5); application for discharge of debtor, 58; on approval of composition court may annul bankruptcy or authorized assignment, 13(18); court may review, rescind or vary any order, 74(1); gazetted defined, 2(q); local newspaper defined, 2 (w).

**Cross References Rules:** Application to rescind receiving order or annul adjudication, 96.

**Cross References Forms:** Order annulling adjudication, 78; notice of order annulling adjudication, 79.

**Analogous Legislation:** English Act, 1914, s. 29.

## ANALYSIS OF NOTES.

Section 62 has no application to receiving order or authorized assignment.

Cases when adjudication will be annulled.



When a receiving order may be rescinded.  
 Effect of annulment on acts done by the trustee.  
 Effect of annulment generally.  
 When debts are paid in full.

## Section 62

Section 62 speaks only of the annulment of an adjudication, but this includes a jurisdiction to rescind a receiving order<sup>2</sup>. The section has no reference to the case of an authorized assignment. It should be read with section 13(18), which provides for the annulment of the bankruptcy or authorized assignment where the court approves a composition extension or scheme.

Sec. 62 has no application to receiving order or authorized assignment.

In spite of what was said by Bacon, V.C., with respect to the inherent power of the court under the Act of 1869 to annul an adjudication<sup>3</sup>, it has been said that there is no inherent power in the court to annul an adjudication under the Act of 1883, and that the Court may annul an adjudication only in the two cases mentioned in 62(1)<sup>4</sup>, namely (1) where the debtor ought not to have been adjudged bankrupt, and (2) where the debts of the bankrupt have been paid in full. It is clear, however, that the court has power to prevent an abuse of its process<sup>5</sup>, and in a proper case the court would no doubt annul the adjudication. But it has been held that the Court will not on the ground that the "debtor ought not to have been adjudged bankrupt", annul an adjudication as an abuse of the process of the court where the debtor presented his own petition in order that the adjudication should relieve him from a debt and free an inalienable pension to which he was entitled from the possibility of execution<sup>6</sup>.

Cases when adjudication will be annulled.

<sup>2</sup> *Per* Sterndale, M.R., *In re a Debtor* (No. 446 of 1918), (1920), 1 K. B. 461; (1920), B. & C. R. 31, 34. See as to the difference between an adjudication of bankruptcy and the making of a receiving order, notes to section 4(5).

<sup>3</sup> *Ex parte Ashworth in re Hoare*, L. R. 18 Eq. 705; 43 L. J. Bank. 143.

<sup>4</sup> *In re Gyll ex parte Board of Trade* (1888), 58 L. J. Q. B. 8; 5 Mor. 272; *In re Painter* (1895), 1 Q. B. 85; 64 L. J. Q. B. 22; 1 Mans. 499; *In re Hester* (1889), 22 Q. B. D. 632, 633; 6 Mor. 85.

<sup>5</sup> *In re Betts ex parte Official Receiver* (1901), 2 K. B. 39; 70 L. J. K. B. 511; 8 Mans. 227.

<sup>6</sup> *In re Painter* (1895), 1 Q. B. 85; 64 L. J. Q. B. 22; 1 Mans. 499; *In re Hancock ex parte Hillearys* (1904), 1 K. B. 585; 73 L. J. K. B. 245; 11 Mans. 1; contrast *In re Betts ex parte Official Receiver* (1901), 2 K. B. 39; 70 L. J. K. B. 511; 8 Mans. 227.



## Section 62

The court has a discretion to refuse to annul the adjudication<sup>7</sup> even where the debts have been paid in full; and will it seems exercise that discretion when the circumstances are such that a discharge would be refused<sup>8</sup>. It has been said that in the exercise of its discretion under section 13(18) the court ought to consider not only the interest of the creditors, but also the interest of the public and of commercial morality, and may refuse to annul the bankruptcy or to approve the scheme<sup>9</sup>. An adjudication not appealed from and duly advertised will not be annulled on the ground that there was no sufficient petitioning creditor's debt to support the adjudication<sup>10</sup>.

When a receiving order may be rescinded.

Although the cases in which a receiving order may be rescinded are not under *The English Act* necessarily limited to those in which an adjudication may be annulled<sup>1</sup>, it is convenient here to discuss the principles which have been laid down by the courts as guides in such cases. When the registrar has made a receiving order and there is no appeal<sup>2</sup>, he is *functus officio* as regards the order; all that can then be done is to apply to have it rescinded<sup>3</sup>. Under section 74(1) the court has a general discretion to rescind a receiving order<sup>4</sup>. But it must be exercised on proper principles<sup>5</sup>.

<sup>7</sup> *In re Keet ex parte O. R.* (1905), 2 K. B. 666; 74 L. J. K. B. 694; 12 Man. 235.

<sup>8</sup> *In re and ex parte Taylor* (1901), 1 K. B. 744; 70 L. J. K. B. 531; 8 Mans. 230; *In re Keet ex parte O. R. supra*, *In re Sullivan & Hughes* (1904), 20 T. L. R. 393.

<sup>9</sup> *In re and ex parte Beer* (1903), 1 K. B. 628; 72 L. J. K. B. 366; 10 Mans. 136.

<sup>10</sup> *Ex parte French in re Trim* (1883), 52 L. J. Ch. 48.

<sup>1</sup> *Ex parte O. R. in re Izod* (1898), 1 Q. B. 241; 67 L. J. Q. B. 111, at 247, 248.

<sup>2</sup> When on an appeal from the decision of the court in making the receiving order it is not alleged that the order was wrongly made, a settlement having been made of the petitioning creditor's claim, the Appeal Court will not rescind the order, but will dismiss the appeal, leaving the way open for an application to be made to the registrar to rescind the order if anything has happened since it was made which will justify the court in rescinding it: *In re and ex parte Norris* (1890), 7 Mor. 8.

<sup>3</sup> *In re Flatau ex parte O. R.* (1893), 2 Q. B. 219; 62 L. J. Q. B. 569; 10 Mor. 151.

<sup>4</sup> *In re Davidson* (1894), W. N. 210; *Ex parte O. R. in re Izod* (1898), 1 Q. B. 241; 67 L. J. Q. B. 111; *In re and ex parte Hester* (1889), 22 Q. B. D. 632; 6 Mor. 85.

<sup>5</sup> *Ex parte O. R. in re Izod, supra*; *In re and ex parte Hester, supra*.



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In exercising its discretion, the court will have to consider the rights not only of the debtor and of the creditors, but also of the public.<sup>6</sup> Similarly where an application is made to the court under section 62(1) to rescind a receiving order on the ground that the debtor's debts have been paid in full, the court has a discretion in the matter, and may refuse to rescind the order if of the opinion that further debts of the debtor may be disclosed on his examination.<sup>7</sup> The court may rescind a receiving order where an arrangement has been made otherwise than in pursuance of section 13 of the Act; but this will be done only with great caution<sup>8</sup>. A receiving order will not be rescinded merely on the consent of the petitioning creditor<sup>9</sup>, and the order will not be rescinded as a matter of course merely because all the creditors consent to the rescission<sup>10</sup>, even where many of them have given the debtor receipts in full for their debts<sup>1</sup>. Where a professional bankrupt makes use of the bankruptcy law in assisting him to commit frauds on his creditors, the receiving order will be rescinded<sup>2</sup>.

Among the acts referred to by the words "all acts theretofore done by the trustee . . . shall be valid" is included the rejection of a proof by the trustee. Where therefore a claim is made in the bankruptcy, which claim is rejected by the trustee, and no appeal from his decision is prosecuted and the bankruptcy is annulled, no step can be taken to enforce the claim, even though it be a judgment<sup>3</sup>. But the trustee cannot by consenting to the lumping of different securities in one valuation give a right to consolidation where none existed before.<sup>4</sup> Where the trustee takes no steps to prevent

Effect of annulment on acts done by the trustee.

<sup>6</sup> *In re a Debtor* (No. 446 of 1918) (1920), 1 K. B. 461, 467; (1920), B. & C. R. 31; *In re and ex parte Hester*, *supra*; *Re Flatau*, *ex parte O. R.*, *supra*.

<sup>7</sup> *In re a Debtor* (No. 446 of 1918), *supra*.

<sup>8</sup> *Ex parte O. R. in re Izod*, *supra*; *In re and ex parte Dixon and Cardus* (1888), 5 Mor. 291.

<sup>9</sup> *In re Flatau*, *ex parte O. R.*, *supra*.

<sup>10</sup> *In re and ex parte Hester*, *supra*.

<sup>1</sup> S. C.

<sup>2</sup> *In re Betts ex parte Official Receiver* (1901), 2 K. B. 39; 70 L. J. K. B. 511; 8 Mans. 227. In this case no distinction seems to have been made between the receiving order and the adjudication.

<sup>3</sup> *Brandon v. McHenry* (1891), 1 Q. B. 538; 60 L. J. Q. B. 448.

<sup>4</sup> *In re Pearce* (1909), 2 Ch. 492; 78 L. J. Ch. 628; 16 Mans. 191.



**Section 62** a claim from being barred by the Statute of Limitations, it would seem that although the bankruptcy is annulled the claim will continue to be barred<sup>5</sup>.

Effect of  
annulment  
generally.

Where a composition is entered into on condition that a bankruptcy shall be annulled, which is done, matters are in the same position as if there had been no bankruptcy subject to this that there has been a substitution of rights under the composition for the remedies which the creditors would otherwise have had in respect of their debts<sup>6</sup>. Thus where proof has been made in bankruptcy by secured creditors who value their security, proving for the balance, and a composition is agreed to in respect of which they receive a dividend on the unsecured balance, and the bankruptcy is annulled, the secured creditors do not thereby become absolute purchasers of the property comprised in the security<sup>7</sup>, but the security remains a security and the debtor becomes entitled to redeem upon payment of the assessed value with interest from the date of the receiving order<sup>8</sup>. Similarly it was decided under *The Bankruptcy Act* of 1869 that where a composition had been accepted and the bankruptcy annulled, and the whole estate of the debtor transferred to the person who guaranteed the composition, the property was so transferred, subject to the right to set off debts which would have been provable in the bankruptcy<sup>9</sup>. It was also held under the same Act that execution creditors who would have lost the benefit of their execution had the bankruptcy gone on were in no better position when the bankruptcy was annulled and a composition was entered into for their benefit as well as that of the other creditors<sup>10</sup>, for the court retained jurisdiction in spite of the annulment of the bankruptcy<sup>1</sup>.

<sup>5</sup> *Markwick v. Hardingham* (1880), 15 Ch. D. 339.

<sup>6</sup> *In re Orpen, Beswick v. Orpen* (1880), 16 Ch. D. 202; 50 L. J. Ch. 25.

<sup>7</sup> *Société Générale de Paris v. Geen* (1883), 8 A. C. 606; 53 L. J. Ch. 153; *Pearce v. Bullard* (1908), 1 Ch. 780; 77 L. J. Ch. 340.

<sup>8</sup> *Pearce v. Bullard* (1908), 1 Ch. 780; 77 L. J. Ch. 340, as modified by *In re Pearce* (1909), 2 Ch. 492; 78 L. J. Ch. 628; 16 Mans. 191.

<sup>9</sup> *West v. Baker* (1875), 1 Ex. D. 44; see also *Bailey v. Johnson* (1872), L. R. 7 Ex. 263; 41 L. J. Ex. 211.

<sup>10</sup> *Ex parte Lennard in re Chadley* (1875), 1 Ch. D. 177; 45 L. J. Bank. 49.

<sup>1</sup> S. C., and see *Bailey v. Johnson* (1872), L. R. 7 Ex. 263; 41 L. J. Ex. 211.



Section 62(4) provides for payment in full of debts in certain cases by bond and by payment into court. Section 62  
 Apart from this provision, it has been decided that When debts  
are paid in  
full.  
 debts are not "paid in full" when part of the creditors have been paid in full and the remainder have given an unconditional release<sup>2</sup>. Payment in full need not necessarily be to the creditor entitled to prove at the time the receiving order was made. It may, it seems, be made to the person beneficially entitled to receive the debt, at least when no proof is on file by the creditor who was entitled to prove when the receiving order was made. But when the original creditors have been paid 2 shillings in the pound for their debts by a friend of the bankrupt to whom another friend pays 20 shillings in the pound for the debts, they have not been "paid in full" within the meaning of section 62(1); for so to hold would be to permit the bankrupt to get rid of his bankruptcy on the terms of paying a small composition to each of his creditors<sup>3</sup>.

<sup>2</sup> *In re Keet, ex parte O. R.* (1905), 2 K. B. 666; 74 L. J. K. B. 694; 12 Man. 235.

<sup>3</sup> *Re Burnett ex parte O. R.* (1894), 63 L. J. Q. B. 423; 1 Mans. 89.



## PART VI.

## COURTS AND PROCEDURE.

*Jurisdiction.*

Section 63  
 Courts  
 jurisdiction.

63 (1) The following named courts are constituted Courts of Bankruptcy and invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:—

(a) In the Provinces of Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island, the Supreme Court of the province;

(b) In the Provinces of Manitoba and Saskatchewan, the Court of King's Bench of the Province;

(c) In the Province of New Brunswick, the King's Bench Division of the Supreme Court of the Province;

(d) In the Province of Quebec, the Superior Court of the Province; and,

(e) In the Yukon Territory, the Territorial Court of the Yukon Territory.

Power of  
 judge in  
 chambers.

(2) Subject to the provisions of this Act and to General Rules, the judge of the court exercising jurisdiction in bankruptcy or in authorized assignment proceedings may exercise in chambers the whole or any part of his jurisdiction.

Appeal  
 courts.

(3) The courts in this subsection named are constituted Appeal Courts of Bankruptcy, and, subject to the provisions of this Act



with respect to appeals, are invested with power and jurisdiction to make or render on appeal asserted, heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the court appealed from. All appeals asserted under authority of this Act shall be made,—

Section 63

- (a) In the Provinces of Nova Scotia and Prince Edward Island, to the Supreme Court *in banc* of the Province;
- (b) In the Provinces of British Columbia, Manitoba and Saskatchewan, to the Court of Appeal of the Province;
- (c) In the Provinces of Ontario and Alberta, to the Appellate Division of the Supreme Court of the Province;
- (d) In the Province of New Brunswick, to the Appeal Division of the Supreme Court of the Province;
- (e) In the Province of Quebec, to the Appeal side of the Court of King's Bench;
- (f) In the Yukon Territory, to the Court of Appeal of the Province of British Columbia.

**Cross References Act:** Sittings and constitution of courts, 64; courts defined, 2(1); bankruptcy districts and divisions, 64(5); enforcement of orders throughout Canada, 71(1); courts to be auxiliary to each other, 71(2); trial of issue by any judge of the courts of the province, 71(3); *cf.* 6(1), 7; enforcement of warrants, 72, 73; review and appeal, 74; appeal court defined, 2(c); general rules, 66; powers of registrar, 65; fees, 67; territorial limitation of jurisdiction of trustees, 14(2); bankruptcy districts and divisions, 64(5); application to court for directions, 18(d).

**Cross References Rules:** Court defined, 2(1); judge defined, 2(1); all matters to be heard in chambers 4; jurisdiction of registrar, 5, 64; adjournment from registrar to judge, 6; transfer of proceedings to another court, 11; proceedings commenced in wrong court, 12; leave to proceed under *Winding Up Act*, 13; summary trial of certain matters, 120; sittings, 63; registrars may act for one another, 64; execution of orders, 65; general practice under rules, 152.



## Section 63

**Analogous Legislation:** English Act, 1914, s. 96(1), 105(1), 101; 1883, s. 102; 1869, s. 72; 1849, s. 12; *Winding Up Act*, 1906, c. 144, ss. 2(e), 101, 102. The Insolvent Acts, 1875, ss. 2(c) (d), 125, 128; 1869, s. 50.

## ANALYSIS OF NOTES.

Amendments.

Three main topics:

- A. Extent of jurisdiction.
- B. Territorial limitation.
- C. Discretionary exercise of jurisdiction conferred.

A. *Extent of Jurisdiction Conferred.*

Jurisdiction under Act of 1849.

No jurisdiction as regards strangers unless they submit.

Simple creditors are strangers for some purposes.

Mortgagee *qua* mortgagee not subject to jurisdiction.

Jurisdiction under the Act of 1869.

Jurisdiction over strangers.

And creditors.

Cases indicating a more limited jurisdiction.

Effect of the Act of 1883.

Jurisdiction under *Insolvency and Winding Up Acts*.

Winding Up Act.

Constitutional question raised by *Stewart v. Lepage*.

Jurisdiction given by section 133 of the *Winding-up Act*.

Whether jurisdiction is exclusive or concurrent.

Claims by mortgagees.

Unpaid vendor's lien.

Master's jurisdiction.

Jurisdiction actually conferred on Courts of Bankruptcy.

All that Parliament was competent to give.

Examples.

Jurisdiction at law and in equity.

B. *Territorial Limitation to Jurisdiction Conferred.*

Provincial limitation to jurisdiction.

Position under *Winding Up Act*.

Positive extra-territorial jurisdiction:

(a) Restraint of actions in other provinces.

(b) Assets out of the province fall under the disposition of the court.

Negative extra-territorial jurisdiction.

Limits to exercise of extra-territorial discretion.

Other pertinent sections of *The Bankruptcy Act*.

C. *Discretionary Exercise of the Jurisdiction Conferred.*

*Bankruptcy Act* differs from *Winding Up Act* and *Insolvency Acts*.

Exercise of discretion.

Refusal to exercise jurisdiction.

Objections to the jurisdiction and to the exercise of the jurisdiction.

Decisions in different provinces.

Amend-  
ments.

Section 63 is given in the form in which it has been left by the amendments contained in sections 45 and 46 of *The Bankruptcy Act Amendment Act, 1921*.



In considering the jurisdiction conferred on the Courts of Bankruptcy by section 63, three principal topics emerge for discussion. Section 63  
Three main topics.

(a) The extent of the jurisdiction conferred by the words, "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act". A. Extent of jurisdiction.

(b) The question whether there is a provincial territorial limitation to the jurisdiction conferred. B. Territorial limitation.

(c) Questions of policy or discretion with respect to the exercise of the jurisdiction conferred. C. Discretionary exercise of jurisdiction conferred.

#### *A. Extent of Jurisdiction Conferred.*

In considering the extent of the jurisdiction conferred by the words "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this act", a conception of what is meant by original auxiliary and ancillary jurisdiction in bankruptcy can best be obtained by a survey of the jurisdiction conferred by the various bankruptcy and winding-up statutes since 1849. In following this legislation it will be seen that there has been a steady movement toward the position that whether or not original jurisdiction in bankruptcy extends to disputes between the debtor or his trustee and "strangers" to the bankruptcy, that is to say persons who are not in their quality of litigants simple creditors or contributories, it is a convenient and perhaps necessary jurisdiction which should belong to the bankruptcy court to be exercised when required.

It will be convenient first to consider the jurisdiction under the English Act of 1849<sup>1</sup>. Section 12 of that Act reads: Jurisdiction under Act of 1849.

"12. That the court in the exercise of its primary jurisdiction by virtue of this Act shall have superintendence and control in all matters of bankruptcy, and shall hear, determine and make order in any matter of bankruptcy whatever, so far as the assignees are concerned relating to the disposition of the estate and effects of the bankrupt or of any estate or effects taken under the bank-

<sup>1</sup> 12 and 13 Vic. c. 106.



## Section 63

ruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the court . . .”

No jurisdiction as regards strangers unless they submit.

Under this section it was held<sup>5</sup> that while the Court had jurisdiction over the estate of the bankrupt it had no power to determine, as between the assignees and strangers claiming adversely, what was the estate<sup>6</sup>, although the court had jurisdiction to interfere at the instance of a stranger to prevent irreparable waste<sup>7</sup>.

But if a stranger applied for and obtained an order in the bankruptcy he brought himself within the jurisdiction so far as related to the order, and might be restrained from doing any act inconsistent with or tending to impede its operation<sup>8</sup>.

Simple creditors strangers for some purposes.

The court further had jurisdiction over a creditor who came in and proved or claimed so far as related to such proof or claim, and the debt which was the subject of it<sup>9</sup>; but it had no power to order a creditor who had proved to give up property in his possession of which he claimed to be the owner<sup>10</sup>.

Mortgagee qua mortgagee not subject to jurisdiction.

Nor could the court compel a mortgagee who did not apply for a sale of his security to give up title deeds held by him<sup>1</sup> or determine the priorities of incumbrancers without their consent<sup>2</sup> or compel the purchaser of property sold by its directions specifically to perform his contract<sup>3</sup>.

<sup>5</sup> See Robson Bankruptcy, 1st edition, 1870, Butterworth, pp. 32-34; Griffith Bankruptcy, Stevens & Sons, 1869, Vol. 1, pp. 70-73.

<sup>6</sup> *Ex parte Holder*, 1 M. & A. 518; *Ex parte Heath*, M. & Bl. 169; *Halford v Gillow*, 13 Sim. 44; *Ex parte Wiggins*, M. & Bl. 168.

<sup>7</sup> *Ex parte Heath*, M. & Bl. 169; *Ex parte Wiggins*, M. & Bl. 168; *Ex parte Elliston*, 2 M. & A. 365.

<sup>8</sup> *Ex parte Bozannet*, 1 Rose 181; *Ex parte Pease*, 1 Rose 232; *Ex parte Anderton*, M. & Mac. 177; *Ex parte Ainsworth*, 3 M. & A. 451; *Ex parte Allison*, 1 G. & J. 210.

<sup>9</sup> *Ex parte Diack*, 2 M. & A. 675; *Ex parte Chambers*, M. & Mac. 130; *Ex parte Flower*, DeG. 503.

<sup>10</sup> *Ex parte Dobson*, 1 M. & A. 666; 4 D. & Ch. 69; *Ex parte Ackroyd*, 1 G. & J. 391; *Ex parte Timbrill*, Buck 305; *Ex parte Hilton*, J. & W. 467; *Ex parte Follett*, DeG. 212; *Ex parte Ainsworth*, 3 M. & A. 451; 2 Dea 563.

<sup>1</sup> *Ex parte Poole*, 1 Ves. Jr. 160.

<sup>2</sup> *Ex parte Allison*, 1 G. & J. 210; *Ex parte Royds*, 3 D. & C. 294.

<sup>3</sup> *Ex parte Cutts*, 3 M. & A. 549; 3 Dea 242.



A considerable change in the law was made by the Act of 1869<sup>4</sup>. Section 72 of that Act reads:—

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"72. Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case; . . ."

Jurisdiction under the Act of 1869.

In the early, and much discussed, case of *In re and ex parte Anderson*<sup>5</sup>, it was decided that the court had jurisdiction to grant an injunction restraining a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before bankruptcy, for it was said the court had complete jurisdiction to decide every question that it might be considered necessary to decide with a view to the distribution of the bankrupt's estate<sup>6</sup>. The court, therefore, also had power to restrain a person within the jurisdiction from enforcing a claim abroad to part of the bankrupt's property there situated<sup>7</sup>.

Jurisdiction over strangers.

It was further held that the Court of Bankruptcy had power to restrain a creditor from bringing against the trustee under a liquidation an action on a bill of sale given by the debtor, the validity of which was disputed by the trustee, James, L.J., saying: "Instead of allowing whatever is left of the estate to be frittered away in litigation the Legislature has determined that there shall be one court to decide all these questions"<sup>8</sup>. Further where an execution creditor had seized property of the debtor and thereupon the debtor presented a petition for liquidation by arrangement with his creditors and obtained an injunction restraining

And creditors.

<sup>4</sup> 32 and 33 Vic. c. 71.

<sup>5</sup> (1870), L. R. 5 Ch. 473; 39 L. J. Bank. 49.

<sup>6</sup> *In re and ex parte Anderson* (1870), L. R. 5 Ch. 473; 39 L. J. Bank. 49; *Halliday v Harris* (1874), L. R. 9 C. P. 668; 43 L. J. Bank. 350.

<sup>7</sup> *Halliday v Harris*, *supra*.

<sup>8</sup> *Ex parte Cohen in re Sparke* (1871), L. R. 7 Ch. 20; 41 L. J. Bank. 16, and see *Ex parte Macdonald in re Beveridge* (1871), 24 L. T. 475; *Ex parte Rumboll, In re Rumboll and Taylor* (1871), L. R. 6 Ch. 842; 40 L. J. Bank. 82, at 84.



**Section 63** further proceedings in the execution, it was held that after the creditors had accepted a composition the effect of which was to free the debtor from his debts except only as to the composition, that the court had jurisdiction to permit the sheriff to proceed with his execution<sup>9</sup>.

Cases indicating a more limited jurisdiction.

On the other hand there are cases under section 72 of the Act of 1869 tending to limit the jurisdiction conferred.<sup>10</sup> Thus it was held that section 72 of the Act of 1869 did not enable the Court of Bankruptcy to draw within the sphere of its jurisdiction property not vested in the assignee, or the owners of such property, and *à fortiori* it did not authorize the Court of Bankruptcy to work out a decree made in Chancery against such persons,<sup>11</sup> nor did it enable the court to adjudicate on the question whether a distress levied before the commission of an act of bankruptcy by the debtor was right or wrong<sup>1</sup>.

Effect of the Act of 1883.

When the Act of 1883 was in preparation it was apparently decided to remove all doubts on the question of jurisdiction, and to make it clear that the rule laid down in *Ex parte Dickin in re Pollard*<sup>2</sup>, for the exercise of the judicial discretion was not an inflexible one, and that the High Court was to be free to do complete justice or to make a complete distribution of property in the case.

Section 102 of that Statute<sup>3</sup> reads:—

102(1) Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which

<sup>9</sup> *Ex parte Sheriff of Middlesex in re England* (1871), L. R. 12 Eq. 207; 40 L. J. Bank. 65.

<sup>10</sup> *Ex parte Dickin in re Pollard* (1878), 8 Ch. D. 377; 48 L. J. Bank. 36, decided that as a general rule cases in which the title of the trustee did not depend on the peculiar law of bankruptcy, as is the case in a mere money demand by the trustee against third parties, ought as a matter of discretion to be left to the ordinary tribunals.

<sup>11</sup> *In re Motion, Maule v. Davis* (1873), L. R. 9 Ch. 192; 43 L. J. Bank. 59; and see *per* Selborne, L.C., in *Ellis v. Silber* (1872), L. R. 8 Ch. 83; 42 L. J. Ch. 666; and *cf.* *Ex parte Pannell in re England* (1877), 6 Ch. D. 335; 47 L. J. Bank. 21

<sup>1</sup> *Ex parte Eatough & Co., Ltd., in re Cliffe* (1880), 42 L. T. 95.

<sup>2</sup> (1878), 8 Ch. D. 377; 48 L. J. Bank. 36.

<sup>3</sup> 46 and 47 Vic. c. 52.



the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:— Section 63

Provided that the jurisdiction of the County Court hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds.

This section was re-enacted without substantial change in section 105 of the present English Act<sup>4</sup>.

These English Statutes and cases from 1849 on are valuable as indicating in what cases a court may be said to be exercising original jurisdiction in bankruptcy, and in what cases auxiliary and ancillary. It is important next to consider the same matter from the point of view of courts under a federal constitution. The cases on the various Canadian Insolvent Acts can best be considered along with the cases under the Winding-Up Acts; for the schemes of these sets of acts as regards jurisdiction are similar. Jurisdiction under *Insolvency and Winding-up Acts*.

*The Winding-up Act*<sup>5</sup> contains no clause purporting to define the jurisdiction given to the provincial courts which are named in the Act. The jurisdiction conferred must be determined by the scope of the Act. The four most important sections for the purpose of the discussion in hand are 18, 22, 23 and 133, which read:— Winding-up Act.

18. The court may, upon the application of the company, or of any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit. Actions of company may be stayed.

22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes. After winding-up order actions against company stayed.

23. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. Execution, etc., against company void.

133. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, or to any effects or property in the hands, possession or custody of a debtor, shall be void. Remedies obtained by summary order.

<sup>4</sup> (1914), 4 and 5 Geo. V. c. 59.

<sup>5</sup> R. S. C. 1906, c. 144.



Section 63 of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

Section 133 corresponds with section 50 of *The Insolvent Act* of 1869<sup>6</sup>, and with section 125 of *The Insolvent Act* of 1875<sup>7</sup>.

The same fluctuation of judicial opinion, with respect to the jurisdiction conferred and the discretionary exercise of that jurisdiction, as occurred under the various English Acts above referred to, is to be noticed in our courts. The questions of territorial limitation of the jurisdiction conferred, and of the discretionary exercise of that jurisdiction, to be treated later, must be distinguished from the subject now being dealt with, namely the jurisdiction conferred on provincial courts with respect to actions or process in the same province against insolvent persons or companies and their representatives.

Until the case of *Stewart v. Lepage*<sup>8</sup>, it was considered that *The Winding-up Act* had established a forum for the determination of all questions incident to the liquidation and the adjustment of the rights of all interested in the due winding up of the company, including the distribution of assets, to which *forum* all claiming under the jurisdiction must resort; but that those who had claims adverse to the company and adverse to the liquidator could not be compelled to attorn to the bankruptcy *forum* and to submit their claims to adjudication there<sup>9</sup>.

*Stewart v. Lepage*<sup>10</sup> laid down a much wider rule and appears to establish the proposition that the Dominion Parliament has jurisdiction to confine "strangers" to the bankruptcy to the bankruptcy

Constitutional question raised by *Stewart v. Lepage*.

<sup>6</sup> 32 and 33 Vic. c. 16.

<sup>7</sup> 38 Vic. c. 16.

<sup>8</sup> (1916), 58 S. C. R. 337.

<sup>9</sup> *In re Ontario Bank* (1916), 38 O. L. R. 242; *In re Tobique Gypsum Co.*, *Costigan v Langley* (1903), 6 O. L. R. 515; *In re Sun Lithographing Co.*, *Farquhar's Claim* (1892), 22 O. R. 57; *Burke v. McWhirter* (1874), 35 U. C. Q. B. 1, 5, 6; *Mitchell Canadian Commercial Corporations* (1916), p. 1579. The function of the court was administrative: *In re Maritime Trust Co., Ltd.*, and *Burns & Co.* (1916), 26 D. L. R. 92.

<sup>10</sup> (1916), 58 S. C. R. 337.



forum in the prosecution of actions against the trustee or the insolvent<sup>1</sup>. The court, however, was not unanimous. Davies, J., delivered a dissenting judgment, saying<sup>2</sup>: "Now I can well understand that such an enactment, however far-reaching it might be and however much it might interfere with civil rights in the province in so far as it dealt with creditors or contributories or assets of the company and so was reasonably necessary for the purpose Parliament was legislating upon, would be *intra vires* of the Dominion Parliament, but I should more than doubt the power of Parliament when legislating upon the subject-matter of bankruptcy and insolvency to deal with and take away the rights of third parties not creditors or contributories of the company and not claiming any right to share in the distribution of the assets of the insolvent company<sup>3</sup>."

Assuming that there is jurisdiction in the Dominion to interfere with the right of "strangers" to sue the debtor or his trustee, it has yet to be decided whether there is jurisdiction to compel "strangers" to submit to bankruptcy jurisdiction at the suit of the liquidator<sup>4</sup>. *The Winding-up Act* does not attempt to confer any such jurisdiction. There is therefore no jurisdiction to determine in a summary application the

<sup>1</sup> Cf. *In re J. McCarthy & Sons Co. of Prescott, Ltd.* (1916), 38 O. L. R. 3; 32 D. L. R. 441. It has even been said that there is jurisdiction under section 133, not only to stay, but also to dismiss an action brought against the liquidator for the full price of goods received by him after the commencement of the winding up: *H. J. Carson & Co. v. The Montreal Trust Co.* (1915), 49 N. S. R. 50. The power given by section 22 of *The Winding Up Act* is a discretional power: *In re R. J. McCarthy & Sons Co. of Prescott, Ltd.*, *supra*; *In re The Cushing Sulphite Fibre Co., Ltd.* (1906), 38 N. B. R. 581. Under *The Winding Up Act* there was jurisdiction to hold a petition for winding up in suspense while an action was being tried in another court seeking to have the resolution on which the petition was based set aside on the ground of fraud: *Belanger v. Union Abitibi Mining Co.* (1917), 32 D. L. R. 700; 25 Que. K. B. 376. There is no such thing as the consolidation of an action and a winding up: *Bailey Cobalt Mines, Ltd. v. Benson* (1918), 43 O. L. R. 321.

<sup>2</sup> At p. 342.

<sup>3</sup> Compare *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575, and see Clement, the Law of the Canadian Constitution, 3rd edition, 1916, pp. 536-7.

<sup>4</sup> Cf. *Kurtz and McLean, Ltd.* (1908), 11 O. W. R. 437.



**Section 63** validity of instruments held by outside parties not connected with the company<sup>5</sup>.

Jurisdiction given by section 133 of the *Winding-up Act*

It is important to define what jurisdiction is conferred by section 133 of *The Winding-up Act*. It should be remembered that there is no English equivalent of section 133. This explains the difference between English and Canadian cases<sup>6</sup>.

Whether jurisdiction is exclusive or concurrent.

The jurisdiction conferred by section 133 may be said to be an exclusive jurisdiction in the sense that in cases falling within it no action may be brought or proceeded with in Canada without leave of the court in which the winding-up proceedings are being conducted<sup>7</sup>, and that court may decide to give a summary remedy<sup>8</sup>. But in another sense it can be said that the jurisdiction is concurrent, and not exclusive; for actions commenced without leave of the Winding-up Court are irregular only not void<sup>9</sup>, and actions may be

<sup>5</sup> *In re Maritime Trust Co., Ltd. & Burns & Co.* (1916), 26 D. L. R. 92.

<sup>6</sup> *Stewart v. Lepage* (1916), 53 S. C. R. 337; *In re R. J. McCarthy & Sons* (1916), 38 O. L. R. 3; 32 D. L. R. 441.

<sup>7</sup> *Baxter v. The International Steel Co.*, 10 Que. P. R. 27; *Laroecque v. Lajoie*, 17 L. C. (J. 41; *Ouimet v. Tees et al.*, 5 L. R. p. 483; *Robillard v. Blanchet* (1901), Q. R. 19 S. C. 383. It is submitted that the same rule will apply under the *Bankruptcy Act* (though the Statute is none too clear on this point) and that after the making of a receiving order by the court of one province the court of another province has not jurisdiction to determine whether the action against the debtor should be allowed to proceed or not. An application to stay proceedings improperly commenced or continued should be made to the court of the province in which they are being carried on; but an application for leave to proceed should be made to the court of Bankruptcy which is seized of the bankruptcy proceedings. In *Salter v. St. Lawrence Lumber Co., Ltd.* (1896), 28 N. S. R. 335, however, the Supreme Court of Nova Scotia considered whether the proceedings taken in that province after the making of a winding-up order by the Supreme Court of New Brunswick might more conveniently be dealt with in the winding-up proceedings. It was held under the *Insolvent Act* of 1869 that no judge in the Province of Quebec had jurisdiction over proceedings in insolvency commenced in Ontario where the insolvent had his domicile, even when the assignee resided in the Province of Quebec and the affairs of the estate were conducted at Montreal: *In re McDonnell* (1871), 15 L. C. J. 145; 3 Rev. Leg. 122.

<sup>8</sup> As this is but the substitution of one forum for another, it has no effect on the running of the Statute of Limitations against the trustee. Service of the notice of motion is in this connection equivalent to the commencement of an action: *In re Mansel, ex parte Norton* (1891), 9 Mor. 198.

<sup>9</sup> And so may be stayed: *Blais v. Banker's Trust Corporation* (1913), 25 W. L. R. 653; 14 D. L. R. 277; *Lavell v. Canadian Mineral Rubber Co.* (1914), 14 D. L. R. 521. It has been said that where proceed-



instituted and proceeded with in other courts on leave of the Winding-up Court where that is necessary<sup>10</sup>. Section 63

"Section 133 does not oust the jurisdiction of the Courts, but establishes an additional tribunal in any case coming within its provisions leaving it to the court in each case to determine whether the matters in controversy can be more advantageously dealt with in the summary manner provided by the Act than in an ordinary action"<sup>11</sup>.

Section 133 applies to a claim by a mortgagee seeking to obtain possession<sup>2</sup>, or for foreclosure of a mortgage on property in the "hands, possession or custody of a liquidator"<sup>3</sup>, but not where the property never has been in the hands, possession or custody of the liquidator<sup>4</sup>. Nor is there jurisdiction under the section to make a mortgagee a party against his will to proceedings under the act between a vendor and the liquidator<sup>5</sup>. In *re Raven Lake Portland Cement Co., National Trust v. Trusts & Guarantee*<sup>6</sup>, it was doubted whether section 133 applied to an action against liquidators brought by a mortgagee who claimed in the alternative either the proceeds of the sale of certain Claims by mortgagees.

ings have been continued after the making of a winding-up order without leave of the court. the court need not require the parties to recommence proceedings but may give leave to proceed on terms such as the payment of the costs of the liquidator in the proceedings taken without authority: *Re Winnipeg and Western Development Co.* (1915), 33 W. L. R. 749. The fact that the plaintiff had no knowledge of the bankruptcy proceedings may possibly affect the disposition of costs: *Lavell v. Canadian Mineral Rubber Co.* (1914), 14 D. L. R. 541.

<sup>10</sup> *Michigan Trust Co. v. Canadian Puget Sound Lumber Co.* (1918), 3 W. W. R. 273; *Ellis v. Silber* (1872), L. R. 8 Ch. 83; 42 L. J. Ch. 666; *White v. Simmons* (1871), L. R. 6 Ch. 555; 40 L. J. Ch. 689; *Waddell v. Toleman* (1878), 9 Ch. D. 212; Distress or execution put into effect after the making of the winding-up order is wholly void: *Salter v. St. Lawrence Lumber Co., Ltd.* (1896), 28 N. S. R. 335; *Ex parte Fourdriniere*, 21 Ch. D. 510. Consequently the sheriff cannot be allowed his costs against the liquidator: *Ex nihilo nihil fit: In re Producers Rock and Gravel Co., Ltd.* (1914), 14 D. L. R. 289.

<sup>11</sup> Per Muirlock, C.J., *In re Kurtz and McLean, Ltd.* (1908), 11 O. W. R. 437.

<sup>2</sup> *Dumble v. White*, 32 U. C. Q. B. 601; *Crombie v. Jackson*, 34 U. C. Q. B. 579, 584, even where he has not proved: *Archibald v. Haldan*, 30 U. C. Q. B. 30.

<sup>3</sup> *Michigan Trust Co. v. Canadian Puget Sound Lumber Co.* (1918), 3 W. W. R. 273.

<sup>4</sup> *Michigan Trust Co. v. Canadian Puget Sound Lumber Co.*, *supra*.

<sup>5</sup> *Kurtz and McLean, Ltd.*, *supra*.

<sup>6</sup> (1911), 24 O. L. R. 286.



Section 63	goods, chattels and book debts mortgaged in trust to secure bonds; or damages for the conversion.
Unpaid vendor's lien.	Section 133 applies to the claim of an unpaid vendor to property which he seeks to recover from an insolvent company <sup>7</sup> .
Master's jurisdiction.	A master under <i>The Winding-up Act</i> has no jurisdiction to order rescission or to make the vendor account for any profit that may have accrued to him <sup>8</sup> .
Jurisdiction actually conferred on courts of bankruptcy.	It remains to consider the jurisdiction actually conferred on the Courts of Bankruptcy by the words: "The following named courts are constituted Courts of Bankruptcy and invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".
All that Parliament was competent to give.	These words are very wide, and appear to invest the Courts of Bankruptcy with the fullest jurisdiction which the Dominion Parliament is competent to confer. It would be difficult to suggest more comprehensive words <sup>9</sup> .
Examples.	It would seem, therefore, that in addition to the cases already referred to in which the court exercised jurisdiction in bankruptcy and insolvency the Court of Bankruptcy has power to direct the mode in which meetings may be held, and the mode in which proxies shall be evidenced, including the question whether it is necessary that proxies be produced at the meeting or whether the results of the proxies may be telegraphed <sup>10</sup> . It has in effect been held in Quebec that the court can, before the appointment of inspectors, give the trustee the permission to act which the inspectors may give under section 20. Thus the court has authorized the trustee to sell part of the property of the bankrupt in order to provide funds for necessary

<sup>7</sup> *Kurtz and McLean, Ltd., supra.*

<sup>8</sup> *In re Hess* (1895), 23 S. C. R. 644, 665, 666, nor is the Master a "court of competent jurisdiction" for the purpose of trying a question of a transfer alleged to be a fraudulent preference: *Hart v. Ontario Express* (1898), 25 O. R. 247.

<sup>9</sup> See generally as to jurisdiction in matters auxiliary and ancillary to bankruptcy and insolvency legislation: *Attorney-General of Ontario v. Attorney-General of Canada* (1894), A. C. 189, 200.

<sup>10</sup> *English, Scottish and Australian, etc.; Bank* (1893), 3 Ch. 385, 395-6, 410-411.



expenses<sup>11</sup>, or to contest an action in a foreign court<sup>12</sup>. Section 63  
 The court has jurisdiction to restrain, at the instance of an interim receiver, an authorized trustee appointed on the petition of another creditor, from proceeding with the sale of the property<sup>13</sup>. The Court has jurisdiction to sanction a scheme between the trustee and an official assignee abroad for the pooling of all assets at home and abroad; and their rateable distribution of them among local and foreign creditors<sup>1</sup>.

Further, where a secured creditor desires to realize his security, but cannot do so before the time for the payment of the first dividend and so cannot prove, *semble* the court has jurisdiction to direct the trustee to make such a reservation as will prevent an injustice being done<sup>2</sup>. It would seem that composition proceedings remain within the jurisdiction of the court after the composition has been approved<sup>3</sup>. The only provision in *The Bankruptcy Act* and Rules which is analogous to section 133 of *The Winding-up Act* is Rule 120.

The Court of Bankruptcy is invested with jurisdiction at law and in equity. Under the Act of 1869 it was said that the Court of Bankruptcy was a complete court of law and equity to determine all questions for the distribution of assets in bankruptcy<sup>4</sup>. The Court of Bankruptcy is a Court of Equity so far as costs are concerned<sup>5</sup>.

Jurisdiction  
at law and in  
equity.

<sup>11</sup> *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 381 (Bruneau, J.) and see *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 383 (Bruneau, J.).

<sup>12</sup> *In re Thornton, Davidson & Co.* (1921), 1 C. B. R. 383 (Surveyor, J.) and see as to handing over property in the possession of the bankrupt, *In re Thornton, Davidson & Co., McDonald's Claim* (1921), 1 C. B. R. 380 (Coderre, J.).

<sup>13</sup> *In re Bonneville & Hollander* (1921), 1 C. B. R. 378 (Panneton, J.).

<sup>1</sup> See *In re P. Macfadyen & Co., ex parte Vizianagaram Mining Co., Ltd.* (1908), 1 K. B. 675.

<sup>2</sup> *Ex parte Good, in re Lee* (1880), 14 Ch. D. 82; 49 L. J. Bank. 49.

<sup>3</sup> *Ex parte Sheriff of Middlesex, in re England* (1871), L. R. 12 Eq. 207; 40 L. J. Bank. 65.

<sup>4</sup> *Ex parte Rumbold, in re Rumbold and Taylor* (1871), L. R. 6 Ch. 842; 40 L. J. Bank. 82, at 84; contrast *In re Motion, Maule v. Davis* (1873), L. R. 9 Ch. 192; 43 L. J. Bank. 59.

<sup>5</sup> Therefore if a trustee does nothing wrong he should have his costs out of the estate: *In re and ex parte Wainwright* (1881), 19 Ch. D. 140, 153.



### *B. Territorial Limitation to Jurisdiction Conferred.*

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Provincial  
limitation to  
jurisdiction.

In the *Bankruptcy Act* as passed in 1919, the wide jurisdiction conferred on the Courts of Bankruptcy was subject to a territorial limitation. The courts mentioned were invested with jurisdiction "within their territorial limits as now established, or as these may be hereafter changed." While this phrase was deleted by section 45 of the *Bankruptcy Act Amendment Act* 1921, there is no section of the Act similar to section 100(1) of the English Act of 1914, which says:—

"Subject to the provisions of this Act, every court having original jurisdiction in bankruptcy shall have jurisdiction throughout England".

The present position under *The Bankruptcy Act* appears to be similar to that under the various *Insolvent* and *Winding-up Acts* which contain no such limitation<sup>6</sup>.

Position  
under  
*Winding-up  
Act*.

Under the *Winding-up Act* the Courts have both a positive and a negative extra-territorial jurisdiction.

Positive  
extra-terri-  
torial juris-  
diction: (a)  
restraint of  
actions in  
other  
provinces.

By virtue of its positive extra-territorial jurisdiction a provincial court charged with the administration of *The Winding-up Act* is a Dominion Court *ad hoc* and can restrain actions in the courts of the other provinces connected with the winding-up proceedings or against the liquidator<sup>7</sup>.

An important difference between *The Winding-up* and *Bankruptcy Acts* has results which may pos-

<sup>6</sup> See *The Insolvent Act*, 1875, ss. 2(c), 128, 150, 151; *The Winding Up Act*, 1906, ss. 2(e), 125-127.

<sup>7</sup> *Baxter v. Central Bank* (1890), 20 O. R. 214; *Mowat v. Dominion Trust Co.* (1915), 8 Sask. L. R. 404; *Brewster v. Canada Iron* (1914), 7 O. W. N. 128; *In re Tobique Gypsum Co.*, *Costigan v. Langley* (1903), 6 O. L. R. 515; *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594. Under the *English Companies Act* (1862), 25 and 26 Vic. c. 89, ss. 87, 122, it was held by Jessel, M.R., in *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594, that an English Court seized of winding-up proceedings had jurisdiction to restrain proceedings by an Irish creditor in Ireland against the company. Much of the reasoning of that learned judge is applicable to the situation under *The Bankruptcy Act*. See also *Middlesborough Fire Brick Co.* (1885), 52 L. T. 98; *In re Herman Loog, Ltd.* (1887), 36 Ch. D. 502; *In re Queensland Mercantile Agency* (1888), 58 L. T. 878; *In re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *In re and ex parte Tait* (1872), L. R. 13 Eq. 311.



sibly bear on the jurisdiction of the courts. Under *The Bankruptcy Act* all the property of the debtor vests in the trustee; under *The Winding-up Act* the property of the company does not vest in the liquidator, but falls under the disposition of the court which virtually takes the place of the directors. The property which falls under the disposition of the court in a winding up includes property outside the province, and not alone the assets of the company, but also the relations of the company with others whether within or without the province<sup>9</sup>. Under *The Bankruptcy Act* although the authority of the trustee is limited territorially he has for the purpose of obtaining possession of and realizing upon the assets of a bankrupt or authorized assignor of whom he is trustee, power to act as such anywhere. The liquidator under *The Winding-up Act* has similar powers. Thus liquidators appointed in one province have power to take possession of property of the company situate in another province; and may in their own name take proceedings in such last mentioned province to have set aside an attachment made after the date of the winding-up order<sup>10</sup>. Similarly the liquidator of a company being wound up in one province can by petition ask that the seizure of the goods of the company in another province be quashed as made without leave of the court administering the winding up<sup>1</sup>.

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(b)

Assets out of the province fall under the disposition of the court.

Under *The Winding-up Act* the courts charged with the administration of the Act have what may be called a negative extra-territorial jurisdiction. Before an action can be brought in a provincial court<sup>2</sup> against the liquidator or against the company<sup>3</sup>, leave must be

Negative extra-territorial jurisdiction.

<sup>9</sup> *Blais v. Banker's Trust Corporation* (1913), 25 W. L. R. 653; 14 D. L. R. 277; *Lavell v. Canadian Mineral Rubber Co.*, (1914), 14 D. L. R. 521. Therefore the beneficial interest in *choses in action* belonging to the company in other provinces is no longer "assets of the company liable to judgment" sufficient to give those other provincial courts power to allow service out of the jurisdiction of a statement of claim: *Brand v. Green* (1900), 13 M. L. R. 101.

<sup>10</sup> *Salter v. St. Lawrence Lumber Co., Ltd.* (1896), 28 N. S. R. 335.

<sup>1</sup> *Phillips v. Canada Cork Co.* (1905), 7 Que. P. R. 223.

<sup>2</sup> See in the case of the Exchequer Court, *The R. and O. Navigation Co. v. S. S. Imperial* (1908), 12 Ex. 243.

<sup>3</sup> *Brewster v. Canada Iron* (1914), 7 O. W. N. 128.



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obtained from the Dominion Court in the province in which the winding-up proceedings are being carried on. If leave is not obtained the provincial court will stay the proceedings or dismiss the motion as the case may be<sup>4</sup>.

Limits to exercise of extra-territorial jurisdiction.

Even under *The Winding-up Act* there were evidences of a disposition to impose limits to the exercise of extra-territorial jurisdiction.

Thus it was held that where in spite of an injunction issued by the court in Ontario a sheriff in another province sold under an execution and executed a deed to the purchaser, the Dominion Court had no jurisdiction to make an order summarily declaring the sale void<sup>5</sup>. In *Henderson v. Canadian Pacific Railway Co.*<sup>6</sup>, the court was equally divided on the question whether the court of another province seized with winding-up proceedings had jurisdiction to attach a debt payable outside that province to a person resident outside the province by a company having an agent in the province.

Other pertinent sections of *The Bankruptcy Act*.

In considering the scheme of *The Bankruptcy Act* with respect to the administration of this Dominion Statute in the various provinces the provisions of sections 71 and 72 should not be overlooked. These sections have been taken from the corresponding English provisions which have to do with the enforcement in Scotland and Ireland of orders of the English courts. See also sections 4(4)(11), 6(4).

<sup>4</sup> *Stewart v. Lepage* (1916), 53 S. C. R. 337; *Hobbs v. Kennabeek Consolidated Silver Mines Ltd.* (1918), 14 O. W. N. 358; *Lavell v. Canadian Mineral Rubber Co.*, *supra*; *Blais v. Banker's Trust Corporation*, *supra*; *Soucy v. La Compagnie d'Imprimerie Electrique* (1902), 5 Q. P. R. 105; *Marcotts v. Turcott* (1901), 4 Q.P.R. 342; *In re McDonnell* (1871), 15 L. C. J. 145; 3 Rev. Leg. 122. In Quebec it is necessary to obtain the leave of the judge of the district in which the winding up order has been made before suit can be brought in any other district in Quebec: *Plante v. Dalmas Pulp Co.* (1914), 20 D. L. R. 983; *of Robillard v. Blanchet* (1901), Q. R. 19 S. C. 383; and it has been said by Hodgins, J.A., *In re J. McCarthy & Sons Co. of Prescott, Ltd.* (1916), 38 O. L. R. 3; 32 D. L. R. 441, that after delegation of the powers of the court to a local Master application should be made to him for leave to bring an action.

<sup>5</sup> *In re Tobique Gypsum Co.*, *Costigan v. Langley* (1903), 6 O. L. R. 515.

<sup>6</sup> (1916), 30 D. L. R. 62.



C. Discretionary Exercise of the Jurisdiction Conferred. Section 63

In considering whether the court should exercise the jurisdiction it possesses over "strangers" to the bankruptcy the provisions of the Act and Rules should be considered and contrasted with the provisions of the Insolvent Acts and *The Winding-up Act*. Sections 6 (1) 7 and 13 A indicate certain of the considerations which should guide the court.<sup>7</sup>

*Bankruptcy Act differs from Winding-up and Insolvency Acts.*

In contrasting the provisions of sections 6(1) and 7 and Rule 120 of *The Bankruptcy Act* with sections 18, 22, 23 and 133 of *The Winding-up Act* and with section 125 of *The Insolvent Act* of 1875, two differences will be noticed:

(a) *The Bankruptcy Act* preserves the rights of secured creditors<sup>9</sup>.

(b) In other respects and particularly by section 133 the provisions of *The Winding-up Act* are much more drastic than those of *The Bankruptcy Act*<sup>10</sup>.

<sup>7</sup> See in the case of a voluntary winding up: *In re Thurso New Gas Co.* (1889), 42 Ch. D. 486.

<sup>9</sup> Even under the *Winding-up Act* it was held that a mortgagee had an absolute right to have leave to proceed with his action after the making of a winding-up order, unless special circumstances made it inequitable for him to do so: *In re The Cushing Sulphite Fibre Co., Ltd.* (1906), 38 N. B. R. 581; or unless the insolvent or the court can say we will without any further litigation give you all which you are entitled to have. *Per James, L.J., In re David Lloyd & Co.* (1877), 6 Ch. D. 339; *In re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150. Under the *Winding-up Act* it was not found convenient to attempt to deal with mortgage actions when there were prior or subsequent incumbrancers: *Canada Cabinet Co.* (1907), 9 O. W. R. 818. "These sections . . . enabling the court to interfere with actions, were intended not for the purpose of harassing . . . third parties, but for the purpose of preserving the limited assets of the company . . . There being only a small fund to be divided among a great number of persons it would be monstrous that one or more of them should be harassing the company with actions. . . . But that has really nothing to do with the case of a man . . . who is merely seeking to enforce a claim not against the company, but to his own property": *per James, L.J., In re David Lloyd & Co., supra.* Section 87 of the *Companies Act* of 1862 (Eng.), was held not to apply to rights of distress: *In re Lundy Granite Co.* (1871), L. R. 6 Ch. 462. It was held by Jessel, M.R., *In re Trimbsaran Coal Iron and Steel Co.* (1876), 24 W. R. 900. that section 87 of the *Companies Act*, 1862, which is analogous to section 7(2) of *The Bankruptcy Act*, only stayed proceedings by persons capable of proving in the winding up; that is to say, by creditors of the company; so that when the debtor as a sub-tenant has goods on the property of the landlord they may be seized for the rent of the tenant: *In re Regent United Service Stores* (1878), 8 Ch. D. 616, and see notes to section 52.

<sup>10</sup> This section was originally section 50 of the *Insolvent Act* of



## Section 63

## Exercise of discretion.

Certain rules for the exercise of the court's discretion are given in the notes to sections 6(1), 7. It has been held under the various English Acts that the court ought to exercise its jurisdiction and dispose of the matter when the bankruptcy *forum* is the most convenient and expeditious *forum*<sup>1</sup> or where matters of bankruptcy law<sup>2</sup> or the superior title of the trustee are involved<sup>3</sup>. In view of the provisions of Rule 120 and section 71(3) the Courts of Bankruptcy under our Act will perhaps exercise their jurisdiction and either try the matter in a summary way or give directions for the trial of the matter in cases in which the English courts might decline to exercise their jurisdiction. Examples of such cases are actions by or against strangers involving the title of the trustee to property, where the trustee claims by no higher title than the debtor<sup>4</sup>.

1869, then section 125 of the *Insolvent Act* of 1875. Anglin, J., said in *Stewart v. Lepage* (1916), 53 S. C. R. 337, 349: "No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interests of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved." See also *Archibald v. Haldan* (1870), 30 U. C. Q. B. 36; *Dumble v. White* (1872), 32 U. C. Q. B. 601; *Crombie v. Jackson* (1874), 34 U. C. Q. B. 575; *Burke v. McWhirter* (1874), 35 U. C. Q. B. 1; *Henderson v. Kerr* (1875), 22 Gr. 92; *Cameron v. Kerr* (1875), 23 Gr. 374; *Munro v. Commercial Building Society* (1875), 36 U. C. Q. B. 465; *In re Kennedy* (1875), 36 U. C. Q. B. 471; *Jameson v. Kerr* (1871), 6 P. R. 3; *Barclay v. Sutton* (1876), 7 P. R. 14; *In re Essex Land and Timber Co.*, 21 O. R. 367; *In re Toronto Wood and Shingle Co.* (1894), 30 C. L. T. 353; *In re R. J. McCarthy & Sons* (1916), 38 O. L. R. 3; 32 D. L. R. 441.

<sup>1</sup> *Morley v. White* (1872), L. R. 8 Ch. 214.

<sup>2</sup> See *Smith v. Baker* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; *In re and ex parte Anderson* (1870), L. R. 5 Ch. 473; 39 L. J. Bank. 49; cf. *Ex parte Dickinson*, in *re Pollard* (1878), 8 Ch. D. 377; 48 L. J. Bank. 36.

<sup>3</sup> *Ex parte Brown in re Yates* (1879), 11 Ch. D. 148; 48 L. J. Bank. 78.

<sup>4</sup> *Ex parte Hutchinson. in re Holt* (1882), 47 L. T. 483. See where a stranger having notice of an application to the court for the exercise of its jurisdiction made no move to oppose it: *In re Sadler ex parte Davis* (1881), 19 Ch. D. 86; as to jurisdiction to order foreclosure see *In re Hart ex parte Fletcher* (1878), 9 Ch. D. 381. See where the property is claimed as against the trustee by a third party who claims to be a secured creditor: *In re England ex parte Pannell* (1877), 6 Ch. D. 335; 47 L. J. Bank. 21.



On the other hand it is probable that the court will not exercise its discretion to stop a suit or proceedings in another court where there are questions raised which do not relate to the bankruptcy at all<sup>5</sup>, or where there are conflicting claims to a part of the bankrupt's property between strangers to the bankruptcy in which the trustee has no interest<sup>6</sup>. Nor is it likely that the court will enforce a simple money demand by the trustee against a third party which is capable of being tried by the ordinary tribunals<sup>7</sup>. Other cases in which the court in England has declined to exercise its jurisdiction are where the title to real estate is in question<sup>8</sup> or where difficult questions of law are involved<sup>9</sup>.

An objection that the court has no jurisdiction whatever may be taken for the first time on appeal, but this may affect the disposition of costs<sup>10</sup>. On the other hand an objection that the court should not exercise its discretionary jurisdiction ought to be taken at the earliest moment. It is too late to take such an objection after the objecting party has taken the chance of a decision in his favour on the merits<sup>1</sup>.

It has been said that although the Winding-up Courts are Dominion Courts the courts of one province are not compelled by judicial comity to follow the previous decision of a court of a different province<sup>2</sup>. But it is suggested with deference that in the administration and interpretation of a Dominion Statute, it is fitting that a judge in one province should follow as far as possible a previous judgment on the same point

<sup>5</sup> *Ex parte Rumboll in re Rumboll and Taylor* (1871), L. R. 6 Ch. 842; 40 L. J. Bank. 82, at 849; *cf. Ex parte Mills in re Manning* (1871), L. R. 6 Ch. 594; 40 L. J. Bank. 89; *In re Deere* (1875), L. R. 10 Ch. 658.

<sup>6</sup> *In re Lowenthal ex parte Beesty* (1884), 13 Q. B. D. 238; 53 L. J. Q. B. 524.

<sup>7</sup> *Ex parte Dickin in re Pollard* (1878), 8 Ch. D. 377; 48 L. J. Bank. 36; *Ex parte Musgrave in re Wood* (1878), 10 Ch. D. 94; 48 L. J. Bank. 39; *Ellis v. Silber* (1872), L. R. 8 Ch. 83; 42 L. J. Ch. 666.

<sup>8</sup> *Ex parte Dickin in re Pollard, supra.*

<sup>9</sup> *Ex parte Dickin in re Pollard, supra.*

<sup>10</sup> *Ex parte Eatough & Co., Ltd., in re Cliffe* (1880), 42 L. T. 95.

<sup>1</sup> *Ex parte Swinbanks in re Shanks* (1879), 11 Ch. D. 525; 48 L. J. Bank. 120; *Ex parte Butters in re Harrison* (1880), 14 Ch. D. 265.

<sup>2</sup> *In re Central Bank ex parte Canada Shipping Co.* (1888), 30 C. L. T. 271, *per* Hodgins, M.O.

## Section 63

Refusal to exercise jurisdiction.

Objections to the jurisdiction and to the exercise of the discretion.

Decisions in different provinces.



Section 64 in another province in order to create and perpetuate uniformity of decisions throughout Canada<sup>3</sup>.

*Sittings and Distribution of Business of Courts.*

Courts not  
subject to be  
restrained.

64 (1) The courts having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of their powers hereunder by the order of any other court.

Periodical  
sittings.

(2) Periodical sittings for the transaction of the business of such courts shall be held at such times and places and at such intervals as each of such courts shall for itself prescribe.

Transaction  
of bank-  
ruptcy  
business by  
special  
judge.

(3) Except as otherwise provided by this Act, all the powers and jurisdiction in bankruptcy and otherwise conferred by this Act may and shall be exercised by or under the direction of one of the judges of the court upon which such powers and jurisdiction are so conferred, and the Minister of Justice shall from time to time assign a judge or judges of such court for that purpose. The judgment, decision or order of such judge shall be deemed the judgment, decision or order of the court, and references in this Act to the court shall, where necessary, apply to such judge exercising the powers and jurisdiction of such court. Provided that during vacation or during the illness of the judge so assigned or during his absence, or for any other reasonable cause, such powers and jurisdiction or any part thereof may be exercised by or under the direction of any judge of the court named for that purpose by the Chief Justice thereof.

<sup>3</sup> See *per* Macdonald, J., in *In re Harrison* (No. 3) (1919), 25 B. C. R. 545, following a decision of Taschereau, J., in the Province of Quebec.



- (4) The Chief Justice of each court upon which such powers and jurisdiction are so conferred shall from time to time appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act. Section 64  
Registrar,  
clerks and  
officers.
- (5) Each Province of Canada shall constitute for the purposes of this Act, one bankruptcy district, but the Governor-in-Council may divide any such bankruptcy district into two or more bankruptcy divisions, and name or number them. A judge shall be assigned to each of such divisions to exercise therein the powers and jurisdiction conferred by this Act on the court of which he is a member. Bankruptcy  
districts and  
divisions.
- (6) In case the Chief Justice of the court having jurisdiction in bankruptcy in any Province shall report to the Minister of Justice that it is impossible or highly inconvenient for any judge of his court to undertake to exercise within any bankruptcy division in such Province the powers and jurisdiction conferred on such court, the Minister of Justice may, from time to time, assign to exercise within said division said powers and jurisdiction any district, county or other judge, who shall for all the purposes of this Act be deemed a judge of the court having jurisdiction in bankruptcy, and references in this Act to the court or to the judge of the court shall, where necessary, apply to such district, county or other judge, so assigned. District or  
county judge  
may be  
assigned to  
bankruptcy  
division.

**Cross References Act:** Jurisdiction, 63; court defined, 2(1); enforcement of orders throughout Canada, 71(1); courts to be auxiliary to one another, 71(2); trial of issue by any judge of the courts of the province, 71(3); cf. 6(1), 7; enforcement of warrants, 72, 73; review and appeal, 74; appeal courts, 63, 2(c); general rules, 66; powers of registrar, 65; definition of registrar, 2(ee); fees, 67; judge defined, 2(n); territorial limitation of jurisdiction of trustees, 14(2); locality



**Section 64** of a debtor, 2(x); jurisdiction in locality of a debtor, 4(4), *cf.* 4(11); transfer of proceedings to another district or division, 6(4).

**Cross References Rules:** Court defined, 2(1); judge defined, 2(1); registrar defined, 2(1); all matters to be heard in chambers, 4; jurisdiction of registrar, 5, 64; adjournment from registrar to judge, 6; registrars may act for one another, 64; transfer of proceedings to another court, 11; proceedings commenced in wrong court, 12; leave to proceed under *Winding Up Act*, 13; sittings, 63; execution of orders, 65; general practice under rules, 152; officers refusing to act, 66.

**Analogous Legislation:** English Act, 1914, ss. 105(2), 96(5), 97; *Winding Up Act*, 1906, c. 144, ss. 109, 110.

Constitutionality of sections 63 and 64.

Sections 63 and 64 have apparently been enacted on the authority of *Valin v. Langlois*<sup>\*</sup> and *In re Vancini*<sup>5</sup>, which decided that the Dominion Parliament might cut of existing provincial courts create new courts, or it might impose new duties on Provincial Courts, or give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces. It may be doubted whether some of the provisions of these sections do not go somewhat beyond the facts on which these cases were decided.

Courts not subject to be restrained

Section 64(1) provides that the courts of bankruptcy are not to be subject to be restrained in the execution of their powers by any other court. If there is any irregularity in point of form in process issued by the Court of Bankruptcy, or if the jurisdiction has been wrongly exercised, the matter is to be set right by proper proceedings in the court itself<sup>6</sup>.

64(3).

On the consent of all parties a judge of the Supreme Court of Ontario has dealt with a motion for an application for an injunction in an action as an application to a bankruptcy judge under section 39<sup>7</sup>.

Appointment of registrars.

As to what registrar or registrars have jurisdiction where no appointment has been made, see *Re X*<sup>8</sup>.

<sup>\*</sup> (1879), 5 A. C. 115; 49 L. J. P. C. 37.

<sup>5</sup> 1904, 34 S. C. R. 621, and see *Attorney-General of Canada v. Sam Chak* (1914), 44 N. S. R. 19.

<sup>6</sup> *Skinner v. Northallerton County Court Judge* (1899), A. C. 439; 68 L. J. Q. B. 896; 2 Mans. 274; *In re New Par Consols, Ltd.* (1898), 1 Q. B. 669; *Halliday v. Harris* (1874), L. R. 9 C. P. 668; 43 L. J. C. P. 350; *per A. L. Smith, L.J.*, *In re Farnham* (1896), 1 Ch. 836, 843; 65 L. J. Ch. 456; 3 Mans. 123; and see notes to section 65.

<sup>7</sup> *Imperial Bank v. Barber* (1921), 1 C. B. R. 485; 20 O. W. N. 282 (Middleton, J.).

<sup>8</sup> (1920), 19 O. W. N. 12; 1 C. B. R. 459 (Holmsted, R.).



*Powers of Registrar.*

- 65 (1) The registrars of the several courts Section 65  
 exercising bankruptcy jurisdiction under Powers of  
 this Act shall have the powers and jurisdic- Registrar.  
 tion in this section mentioned, and any  
 order made or act done by such registrars in  
 the exercise of the said powers and jurisdic-  
 tion shall be deemed the order or act of the  
 court.
- (2) Subject to General Rules limiting the Particulars.  
 powers conferred by this section, a registrar  
 shall have power,—
- (a) to hear bankruptcy petitions where  
 they are not opposed, and to make receiv-  
 ing orders and adjudications thereon,  
 where they are not opposed;
  - (b) to hold examinations of debtors;
  - (c) to grant orders of discharge where the  
 application is not opposed;
  - (d) to approve compositions, extensions or  
 schemes of arrangement where they are  
 not opposed;
  - (e) to make interim orders in cases of  
 urgency;
  - (f) to make any order or exercise any juris-  
 diction which by any rule in that behalf is  
 prescribed as proper to be made or exer-  
 cised in chambers;
  - (g) to hear and determine any unopposed  
 or *ex parte* application;
  - (h) to summon and examine any person  
 known or suspected to have in his posses-  
 sion effects of the debtor or to be indebted  
 to him, or capable of giving information  
 respecting the debtor, his dealings or pro-  
 perty;
  - (i) to hear and determine appeals from the  
 decision of a trustee allowing or disallow-  
 ing a creditor's claim where such claim  
 does not exceed five hundred dollars.



## Section 65

## Exception.

## Appeal from registrar.

- (3) A registrar shall not have power to commit for contempt of court.
- (4) Any person dissatisfied with an order or decision of the registrar may appeal therefrom to a judge, in manner prescribed by General Rules.

**Cross References Act:** Registrar includes any other officer who performs duties like to those of a registrar, 2(*ee*) ; appointment of registrars, 64(4) ; courts exercising jurisdiction under the Act, 63 ; bankruptcy petitions, receiving orders and adjudications, 4 ; examination of debtors, 56 ; Discharge of bankrupt or assignor, 58 ; compositions, extensions and schemes, 13 ; examination of persons known or suspected to have effects of debtor, 56 ; disallowance of claims by trustee, 53.

**Cross References Rules:** Registrar defined, 2(1) ; all matters to be heard in chambers, 4 ; jurisdiction of registrar, 5 ; certain applications to be to judge in chambers, 120, 117, 119 ; adjournment from registrar to judge, 6 ; appeals from registrar, 67 ; registrar refusing to act, 66 ; application of trustee for discharge to be made to registrar, 107, 109.

**Analogous Legislation:** English Act, 1914, s. 102.

## Jurisdiction of registrar.

Under the English practice certain matters must be heard in open court<sup>9</sup>. There is no such rule under *The Bankruptcy Act*. The result is that by the combined effect of section 65(2)(f) and Rule 4, the Registrar has jurisdiction to deal with practically any matter<sup>10</sup>. Thus he may deal with an application under section 71(2) for an order directing persons within the jurisdiction to hand over books and papers<sup>11</sup>, and he has jurisdiction under rule 40 to order the production for the inspection of the trustee of all documents and papers relating to the estate of the debtor<sup>1</sup>. While he may not commit for contempt of court<sup>2</sup>, he has power to give leave for substituted service of a notice of motion for committal<sup>3</sup>.

Application should, it seems, in the first instance be

<sup>9</sup> See English Rule 6.

<sup>10</sup> See notes to Rules 4 and 5. See as to the question whether the registrar can be given jurisdiction by the bankruptcy judge in matters which that judge has power to dispose of in his capacity not as judge in bankruptcy but as one of the judges of the court which has been given bankruptcy jurisdiction: *Re Wood ex parte Fanshawe* (1897), 1 Q. B. 314; 66 L. J. Q. B. 69; 3 Mans. 299.

<sup>11</sup> *In re Firbank ex parte Knight* (1887), 4 Mor. 50.

<sup>1</sup> *In re Geiger* (1913), 109 L. T. 224.

<sup>2</sup> Section 65(3).

<sup>3</sup> *Ex parte Board of Trade in re Calderwood* (1890), 7 Mor. 251.



made to the registrar in any matter in which he has jurisdiction; for although the registrar may refer a case to the judge if it is one of difficulty or novelty<sup>4</sup>, he may not delegate his work to the judge<sup>5</sup>. Thus the registrar should hear and determine an application made *ex parte* for an injunction, even though the judge in bankruptcy be sitting<sup>6</sup>. But where a bankrupt's application for his discharge raises issues of great importance and magnitude, this may be ground for an application to have the question settled before the judge and not before the registrar<sup>7</sup>. It is no ground for such an application that the registrar had been concerned in the making of an order for the prosecution of the bankrupt for offences under the Act<sup>8</sup>.

Section 65

Registrar should dispose of matters over which he has jurisdiction.

Where the registrar makes an order he is the court that makes it and he alone is the court which can review or rescind it<sup>9</sup>, and the same is true of orders by the judge and *semble*, the Appeal Court<sup>10</sup>. No one of these courts can review, rescind or vary the order of the other unless a right of appeal is clearly given by the statute<sup>1</sup>. The judge therefore can only review the decision of the registrar on appeal from that decision<sup>2</sup>.

Registrar is the only person who can review or rescind his own order unless application be by way of appeal.

It was said in *Re Macdonald, ex parte Grant*<sup>3</sup>, that it was the duty of the registrar to assist the Court of Appeal by taking down in writing the material parts of the evidence given before him; and that he ought to be firm in resisting the putting of irrelevant questions.

General duty of registrar with respect to evidence.

Section 65(4) was first enacted by *The Bankruptcy Act Amendment Act 1920*.

<sup>4</sup> *Ex parte Foster in re Webster* (1886), 3 Mor. 132.

<sup>5</sup> *In re Firbank ex parte Knight, supra*.

<sup>6</sup> *In re Brooks* (1886), 3 Mor. 62.

<sup>7</sup> *In re and ex parte Hooley* (1899), 80 L. T. 495; 6 Mans. 176.

<sup>8</sup> S. C.

<sup>9</sup> See section 74(1).

<sup>10</sup> *Per* A. L. Smith, J., *In re and ex parte Maugham* (1888). 21 Q. B. D. 21; 57 L. J. Q. B. 487; 5 Mor. 152.

<sup>1</sup> S. C. and see *In re and ex parte Clifton* (1890), 7 Mor. 59; *Ex parte Registrar of Croydon County Court in re Wise* (1886), 17 Q. B. D. 389; 55 L. J. Q. B. 362; 3 Mor. 174.

<sup>2</sup> *In re Moore* (1885), 2 Mor. 78; *cf. Ex parte Lewis in re Beard* (1893), 69 L. T. R. 259; 10 Mor. 178; see section 65(4) and Rule 67 for the procedure in such case.

<sup>3</sup> (1888), W. N. 130.



### General Rules.

#### Section 66

#### General Rules.

- 66 (1) The Governor-in-Council may make, alter or revoke, and may delegate to the judges of the several courts exercising bankruptcy jurisdiction under this Act the power to make, alter or revoke, General Rules, not inconsistent with the terms of this Act for carrying into effect the objects thereof.
- (2) Such rules shall not extend the jurisdiction of the court, save and except that, for the purpose of enabling the provision of rules having application to corporations, but for such purpose only, the *Winding-up Act*, chapter 144 of the *Revised Statutes of Canada*, shall be deemed part of this Act.
- (3) All general rules, as from time to time made, shall be laid before Parliament within three weeks after made, or, if Parliament is not then sitting, within three weeks after the beginning of the next Session. Such rules shall be judicially noticed, and shall have effect as if enacted by this Act.

**Cross References Act:** Courts exercising jurisdiction under the Act, 63; corporation defined, 2(*k*); *Winding Up Act* referred to, 2(*o*); contributories, 36; general rules includes forms, 2(*r*).

**Cross References Rules:** Leave to proceed under *Winding Up Act*, 13; rules in cases not provided for, 152.

**Analogous Legislation:** English Act, 1914, s. 132; Canadian Acts (1875), ss. 116, 122, 123; (1869), ss. 133, 139.

The Rules and Forms were promulgated by the Governor-General in Council June 30, 1920, P.C. 1398<sup>4</sup>.

*Quære*, whether a rule made in excess of the power given by section 66(1) acquires the force of a statute under section 66(3)<sup>5</sup>.

It was held in England that a rule giving to the Board of Trade a right of appeal in certain cases from

<sup>4</sup> See as to power to make and amend rules (R. S. C. 1906, c. 1, ss. 12, 31(*g*); 6 Ed. VII. c. 21, s. 2.

<sup>5</sup> *In re Hann ex parte Foreman* (1887), 18 Q. B. D. 393; 56 L. J. Q. B. 161; 4 Mor. 16; *In re and ex parte Dale* (1885), 2 Mor. 92; 33 W. R. 476; 52 L. T. 627; *cf. Institute of Patent Agents and Others v. Lockwood* (1894), A. C. 347.



an order of discharge was a rule for carrying into effect the objects of the Act<sup>6</sup>. The rules may, without extending the jurisdiction of the court or infringing section 66(2), impose on the debtor obligations with respect to an application for discharge other than those contained in the Act<sup>7</sup>. Section 67

Certain of the rules are directory. They should be complied with by the registrar, but non-compliance does not make subsequent proceedings bad<sup>8</sup>.

### *Fees and Returns.*

67. All attorneys, solicitors and counsel acting for the trustee or for the estate of a debtor in respect of proceedings under this Act, shall be paid out of the assets of such estate their reasonable costs and fees as fixed in a tariff provided by General Rules; but, except as hereinafter provided, the aggregate amount of such costs and fees so payable out of the assets of estates whereof the gross proceeds exceed five thousand dollars shall not exceed five per centum of such gross proceeds. This provision shall not disentitle such attorneys, solicitors and counsel to any costs or fees which may be awarded against or be payable by persons other than the trustee or the estate of the debtor, and notwithstanding anything in this Act contained, in estates whereof the gross proceeds do not exceed five thousand dollars, the costs or fees payable may, by unanimous vote of the inspectors, be increased to any amount not to exceed ten per centum of the gross proceeds of such estate. Such tariff

Tariff of  
costs and  
fees.

<sup>6</sup> *In re Stainton ex parte Board of Trade* (1887), 19 Q. B. D. 182; 4 Mor. 242, and see *In re and ex parte Dale* (1885), 2 Mor. 92; 33 W. R. 476; 52 L. T. 627; *Ex parte Edwards in re Howe* (1885), 54 L. J. Q. B. 447; 2 Mor. 203.

<sup>7</sup> *In re Spratley* (1909), 1 K. B. 559; 78 L. J. K. B. 390; 16 Mans. 91.

<sup>8</sup> *In re and ex parte Hunt* (1872), L. R. 8 Ch. 234; 28 L. T. 3; *Ex parte DeBoos in re Shallow* (1879), 40 L. T. 659.



## Section 67

shall also fix the fees to be paid to the officers of the court and shall direct by whom and in what manner such costs and fees are to be collected and accounted for and to what account they shall be paid.

**Cross References Act:** Power of trustee to bring, institute or defend an action, 20(1) (c); power to employ a solicitor or other agent, 20(1) (d); fees and expenses of the trustee, 51(1); costs of administration, 51(2); remuneration and disbursements of trustee, 40, 15(5); barristers, solicitors or advocates in any province may practice in others, 87.

**Cross References Rules:** Tariff of costs, 57(1); scale of solicitor's costs when the estimated assets of the debtor do not exceed fifteen hundred dollars, 57(2); costs out of joint and separate estates, 60; costs payable out of the estate, 61; fees, 62; costs and taxation generally, 54-61; proceedings, 7-13.

**Cross References Forms:** Part II. Tariff of costs.

**Analogous Legislation:** English Act, 1914, Rule 103.

Section 67 is given in the form in which it stands in consequence of the amendment contained in section 59 of *The Bankruptcy Act Amendment Act, 1921*.

Lower scale  
of costs in  
Rule 57(2).

The lower scale provided by rule 57(2) does not apply to costs taxable by third parties against the estate such as persons with whom the trustee has had unsuccessful litigation<sup>10</sup>, nor does it appear to apply to matters which are not "proceedings under the Act" such as conveyancing business<sup>1</sup>, or proceedings on behalf of the estate in other courts<sup>2</sup>. But the words "proceedings under the Act" include in England for the taxation of costs incurred for the trustee, the costs of a trustee's application to disclaim leaseholds<sup>3</sup>, or proceedings instituted by him with respect to an alleged fraudulent preference<sup>4</sup>.

Separate  
authoriza-  
tions not to  
be exceeded.

Where a solicitor is employed by a trustee with the consent in writing of the inspectors<sup>5</sup> to transact sepa-

<sup>10</sup> *In re Dowson ex parte Jaynes* (1887), 5 Mor. 240; such a person will get full costs; but *semble* the result of the cases in England is anomalous, for the trustee in such litigation will get full costs if he succeeds but if he loses he can only charge the estate with three-fifths: *In re Marsh ex parte Board of Trade* (1894), 1 Mans. 486; *In re Proctor* (1891), 2 Q. B. 433; 8 Mor. 348.

<sup>1</sup> *In re Parfitt ex parte Board of Trade* (1889), 23 Q. B. D. 40; 58 L. J. Q. B. 428; 6 Mor. 166.

<sup>2</sup> *In re Weighell* (1909), 1 K. B. 92; 78 L. J. K. B. 86; 15 Mans. 335.

<sup>3</sup> *In re Proctor* (1891), 2 Q. B. 433; 8 Mor. 348.

<sup>4</sup> *In re Marsh ex parte Board of Trade* (1894), 1 Mans. 486. See further as to "proceedings" Rules 7-13, sec. 68(2).

<sup>5</sup> See section 20(1) (d).



rate matters of business, and in each case the amount of costs to be incurred is limited, the solicitor should not lump his charges against the total of the sums authorized, but should bring in his bills for taxation showing that in no case have the amounts authorized been exceeded. If this is not done the debtor after his discharge may have the taxation re-opened<sup>6</sup>.

Section 68

### Procedure.

- 68 (1) All proceedings in bankruptcy or under authorized assignments subsequent to the presentation of a bankruptcy petition or the making of an authorized assignment shall be entitled "In the matter of the Bankruptcy" of the debtor, or "In the matter of the Authorized Assignment" of the debtor, as the case may be. Title of papers.
- (2) Subject to the provisions of this Act and to General Rules, the costs of and incidental to any proceeding in court under this Act shall be in the discretion of the court. Costs.
- (3) The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose. Adjournment.
- (4) The court may at any time amend any written process or proceedings under this Act upon such terms, if any, as it may think fit to impose. Amendment.
- (5) Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose. Extension of time.
- (6) Subject to General Rules, the court may in any matter take the whole or any part of the evidence either *viva voce*, or by interrogatories, or upon affidavit, or, out of the Dominion of Canada, by commission. Evidence.

<sup>6</sup>In *re Yeatman* (1916), 1 K. B. 780; 85 L. J. K. B. 789; 2 H. B. R. 30.



**Section 68**

Consolidation of petitions.

Power to change carriage of proceedings.

Continuance of proceedings on death of debtor.

Stay of proceedings.

- (7) Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them, on such terms as the court thinks fit.
- (8) Where the petitioner does not proceed with due diligence on his bankruptcy petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor, or may dismiss the petition.
- (9) If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.
- (10) The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

**Cross References Act:** No advantage to be gained by any mistake, defect or imperfection, 12; proceedings not to be invalidated by formal defects, 84; costs and fees of attorneys, solicitors and counsel, 67; actions in official name of trustee, 16; computation of time, 82; property of partners vested in same trustee, 69(3); extension of time for statement of affairs, 54(1); staying proceedings on petition, 4(7) (8); receiving order on another petition, 4(8); style of cause in certain composition proceedings, 13(3e).

**Cross References Rules:** Adjournment of proceedings before judge, 6; computation of time, 148-151; costs of witnesses in discretion of court, 36; conduct money, 42; awarding of costs, 54; costs of petition, 55; taxation of costs, 56; tariff of costs, 57; costs out of joint and separate estates, 60; costs payable out of estate, 61; fees, 62; costs of application to approve composition, etc., 102; non-compliance with rules not to render proceeding void, 146; witnesses and depositions, 34 to 42; rules relating to petition, 74 *et seq.*

**Cross References Forms:** Part II., tariff of costs; Part III., scale of fees.

**Analogous Legislation:** English Acts, 1914, ss. 97(3), 109-113; 1883, ss. 105-109.



## ANALYSIS OF NOTES.

Section 68(2) costs.

"Proceeding in court."

Section 68(3) adjournment.

Section 68(4) amendment.

Section 68(5) extension of time.

Section 68(6) evidence.

Section 68(7) consolidation.

Section 68(8) substitution of petitioner.

Section 68(9) continuance of proceedings on death of debtor.

## Section 68

Where a trustee makes an application to the court not in discharge of any statutory duty, but in exercise of his powers under the Act and the application is dismissed, the court will order him to pay the costs, but may in a proper case give him indemnity out of the estate<sup>7</sup>.

The court will not necessarily order the trustee to pay the costs of a person into whose possession property of the bankrupt has come even though that person may be innocent of wrong doing<sup>8</sup>. Nor where no special circumstances exist will the court approve a consent order whereby the trustee agrees to pay the costs of the other party as between solicitor and client<sup>9</sup>.

*Quære*, whether the court has jurisdiction to order a debtor to pay part of the petitioning creditor's costs of an unsuccessful petition<sup>10</sup>.

The examination of a debtor is a proceeding in court within the meaning of section 68(2) and the court under the English practice may order the costs of the petitioning creditor in connection therewith to be paid out of the estate<sup>1</sup>. A meeting of creditors called after the first meeting, the object of the meeting being to discuss the confirmation of a scheme of arrangement of the debtor's affairs previously submitted to the first

<sup>7</sup> *In re Williams ex parte O. R.* (1913), 2 K. B. 88. See Rule 54(3).

<sup>8</sup> *In re Bates ex parte Hobbs* (1892), 9 Mor. 25.

<sup>9</sup> *In re Guy ex parte Scantlebury* (1887), 4 Mor. 300.

<sup>10</sup> *In re a Debtor* (1910), 1 K. B. 313; 79 L. J. K. B. 263; 17 Mans. 6.

<sup>1</sup> *Ex parte Board of Trade in re Strand* (1884), 13 Q. B. D. 492; 53 L. J. Q. B. 563; 1 Mor. 196. See further as to "proceedings" Rules 7-13, sec. 67.



**Section 68** meeting, is not a “proceeding in court”; for the functions of the court are for the time being in abeyance, and its jurisdiction is not revived until the scheme is submitted to the court for approval<sup>2</sup>.

**Sec. 68(3)** The power of adjournment given by this section  
**adjournment.** applies to cases of adjudication under section 4<sup>3</sup>.

**Sec. 68(4)** Under the English section corresponding with 68(4)  
**amendment.** leave has been given to amend a petition which had been presented by a bare trustee, by joining the *cestui que trust* even though three months had elapsed since the petition was presented<sup>4</sup>; and to amend a partnership petition by adding the trustee of an insolvent partner<sup>5</sup>; and to amend a receiving order against a partnership by excluding from its operation an infant partner<sup>6</sup>; and to amend a receiving order by striking out all reference to an alleged act of bankruptcy involving third parties who had no opportunity of being heard<sup>7</sup>; but the court has refused to amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy upon which the petition was founded, creditors whose debts are other than those in respect of which the petition was presented<sup>8</sup>.

**Sec. 68(5)** Under the English section corresponding with sec-  
**extension of** tion 68(5) the court has jurisdiction to extend the time  
**time.** within which the trustee must elect whether he will disclaim premises occupied by the debtor, but some

<sup>2</sup> *Ex parte Board of Trade in re Strand*, *supra*.

<sup>3</sup> *In re Lord Thurlow ex parte O. R.* (1895), 1 Q. B. 724; 64 L. J. Q. B. 479; 2 Mans. 158; *cf. In re a Debtor ex parte O. R.* (1901), 84 L. T. 666. The court possesses a wide judicial discretion in granting adjournments of the hearing of a petition: *In re Debtor ex parte Creditor* (1920), B. & C. R. 1.

<sup>4</sup> *Ex parte Dearle in re Hastings* (1884), 14 Q. B. D. 184; 54 L. J. Q. B. 74; 1 Mor. 281; *In re Ellis ex parte Hinshelwood* (1887), 4 Mor. 283. In these cases leave was given by the court of appeal, the appellant being ordered to pay the costs of the appeal and the costs of the amendment.

<sup>5</sup> *In re and ex parte Owen* (1884), 13 Q. B. D. 113; 53 L. J. Q. B. 863; 1 Mor. 93.

<sup>6</sup> *Lovell and Christmas v. Beauchamp* (1894), A. C. 607; 63 L. J. Q. B. 802; 1 Mans. 467.

<sup>7</sup> *In re a Debtor ex parte a Person aggrieved* (1912), 106 L. T. 344.

<sup>8</sup> *In re and ex parte Maund* (1895), 1 Q. B. 194; 64 L. J. Q. B. 183. See as to the power to add or substitute petitioners: *Re Thomas* (1921), 1 C. B. R. 473; 20 O. W. N. 180 (Orde, J.). See notes to sec. 68(8).



good reason should be adduced by the trustee on such an application; and if the rights of other parties will be prejudiced by the time being extended, the court will as a general rule put the trustee on terms<sup>10</sup>. Section 68

An order giving leave to enter an appeal is not the same thing as an order extending the time for notice of appeal<sup>1</sup>.

See as to extension of time for compliance with a bankruptcy notice *In re G. E. B.*<sup>2</sup>

In England in the High Court<sup>3</sup> unless the parties agree<sup>4</sup> that evidence on a motion shall be taken *viva voce*, and not by affidavit, leave to use *viva voce* evidence must be obtained on a separate application made before the motion comes on to be heard; and before all the expense of affidavit evidence has been incurred<sup>5</sup>. The application should be made to the judge and not to the registrar in a case which is to be heard before the judge<sup>6</sup>. Where parties agree that the evidence shall be *viva voce*, written notice is given to the clerk of the court who enters the motion on a special list to be heard with *viva voce* evidence. Application is then made to the court to fix a day for the hearing of the motion<sup>7</sup>. Sec. 68 (6) evidence.

Whoever calls the debtor as a witness on an application may cross-examine him as to what account he has given of a matter on a previous occasion<sup>8</sup>.

Where a member of a partnership dies insolvent and an order is made for the administration of his Sec. 68 (7) consolidation.

<sup>10</sup> *In re Price ex parte Foreman* (1884), 13 Q. B. D. 466; 1 Mor. 153.

<sup>1</sup> *In re Phillips ex parte Trustee* (1895), 2 Mans. 206.

<sup>2</sup> (1903), 2 K. B. 340; 10 Mans. 243; *Brook v. Emerson* (1906), 95 L. T. 821.

<sup>3</sup> The rule does not apply to county courts; *In re Wilson ex parte Watkinson* (1887), 4 Mor. 238; 57 L. T. 201; 35 W. R. 668.

<sup>4</sup> *In re Underhill* (1886), 18 Q. B. D. 115; 3 Mor. 282; Practice note in 6 Mans. 287.

<sup>5</sup> *Ex parte Kearsley in re Genese* (1886), 17 Q. B. D. 1; 55 L. J. Q. B. 225; 3 Mor. 57. Where an affidavit has been filed verifying the debt and the hearing has been adjourned the registrar should, when the matter comes on again for hearing, permit the petitioner to give oral evidence of the continuance of the debt: *In re Staples ex parte Smith & Sons* (1894), 42 W. R. 448.

<sup>6</sup> *In re Hagan & Co. ex parte Adamson* (1886), 3 Mor. 117.

<sup>7</sup> *In re Underhill* (1886), 18 Q. B. D. 115; 3 Mor. 282.

<sup>8</sup> *In re Cunningham ex parte O. R.* (1899), 6 Mans. 199; 80 L. T. 503; *In re Osborne ex parte Lovell* (1895), 43 Sol. J. 480.



## Section 69

estate in bankruptcy<sup>9</sup>, and afterwards the surviving partner becomes bankrupt the court may, it seems, direct the proceedings in the two estates to be consolidated<sup>10</sup>.

Sec. 68(8)  
substitution  
of petitioner.

After the dismissal of a petition on the ground that the petitioning creditor had assented to the deed of assignment which was the act of bankruptcy alleged, the court will not, if the original act of bankruptcy is no longer available to found a petition, substitute another creditor in place of the petitioning creditor<sup>1</sup>.

Sec. 68(9)  
continuance  
of proceedings  
on death  
of debtor.

If a debtor dies after a petition has been presented against him<sup>2</sup>, the representatives are at liberty to try to make arrangements with the creditors if they so wish, and if they do so the court will no doubt consider that it ought to "otherwise order."<sup>3</sup>; but if the debtor dies before service of the petition on him the proceedings must be stayed; for there can be no substituted service in such case<sup>4</sup>. See as to the rights in England of secured creditors where the debtor made a composition with his creditors and then died, *In re Hardy*<sup>5</sup>.

Power to  
present  
petition  
against one  
partner.

69 (1) Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm, without including the others.

Power to  
dismiss  
petition  
against some  
respondents  
only.

(2) Where there are more respondents than one to a bankruptcy petition the court may dismiss the petition as to one or more of them, without prejudice to the effect of the

<sup>9</sup> See English Act, 1914, s. 130.

<sup>10</sup> *In re Greaves ex parte O. R.* (1904), 2 K. B. 493; 73 L. J. K. B. 975; 11 Mans. 270.

<sup>1</sup> *In re and ex parte Maugham* (1888), 21 Q. B. D. 21; 57 L. J. Q. B. 487; 5 Mor. 152. See notes to sec. 68(4).

<sup>2</sup> The words "by or" in the first line of section 68(9) are surplusage. They refer to the English practice under which a debtor may himself present a petition in bankruptcy.

<sup>3</sup> *In re Walker ex parte Sharp* (1886), 3 Mor. 69; 54 L. T. 682; 34 W. R. 550.

<sup>4</sup> *In re Easy ex parte Hill* (1887), 19 Q. B. D. 538; 56 L. J. Q. B. 624; 4 Mor. 281; and see section 130 of the English Act of 1914.

<sup>5</sup> (1896), 1 Ch. 904; 65 L. J. Ch. 461; 3 Mans. 150.



petition as against the other or others of them. Section 69

- (3) Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and unless the court otherwise directs, the same trustee shall be appointed as may have been appointed in respect of the property of the first mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.
- Property of partners to be vested in same trustee.

**Cross References Act:** Petitioning creditor's debt, 4(3)(a); consolidation of proceedings where two or more petitions against the same debtor or joint debtors, 68(7); limited partnerships, 76; administration in joint and separate estates, 51(3).

**Cross References Rules:** Service on firm or person carrying on business under style other than his own, 80, 81; effect of receiving order against a firm, 94; liability of limited partners, 95.

**Analogous Legislation:** English Acts (1914), ss. 114-116; (1883), ss. 110-112; (1869), ss. 100-102; (1849), ss. 97, 98.

#### ANALYSIS OF NOTES.

Petition against firm.

Transfer of proceedings.

Consolidation of proceedings.

No consolidation in case of assignments.

Consolidation of joint and separate estates.

To support a petition against a firm, each of the partners must have committed or concurred in an act of bankruptcy<sup>6</sup>. Petition against firm.

The application for transfer should be made to the registrar of the court in which the second petition has been filed<sup>7</sup>. Transfer of proceedings.

<sup>6</sup> *Hogg v. Bridges* (1818), 8 Taunt. 200; *Bowker v. Burdekin* (1843), 11 M. & W. 128; 12 L. J. Ex. 329; *Mills v. Bennett* (1814), 2 M. & S. 556; *Ex parte Mavor* (1815), 19 Ves. 538, 542; *In re and ex parte Clark* (1832), 1 Dea & C. 544.

<sup>7</sup> *In re and ex parte Nicholson* (1886), 3 Mor. 46. The words "by or" in lines two and three of section 69(3) are surplusage. They refer to the English practice under which a debtor may himself present a petition in bankruptcy.



## Section 70

Consolidation of proceedings.

Sections 68(7) and 69(3) give jurisdiction to consolidate proceedings in different cases; but apart from these sections there is jurisdiction, at least in England, to consolidate in cases not mentioned in those sections<sup>8</sup>. Under the English section corresponding with section 69(3), the court has ordered the consolidation of proceedings in the bankruptcies of two partners who had dissolved partnership before the petitions were filed; but who still had joint assets and joint liabilities<sup>9</sup>.

*Seem* a consolidation may be ordered under this section where a creditor has obtained an adjudication against joint debtors and a previous petition had been presented by him against one of the debtors separately<sup>10</sup>. The bankrupt has no *locus standi* to oppose a motion for such consolidation<sup>1</sup>.

No consolidation in case of assignments.

Section 69(3) makes no provision for the consolidation of administration where there have been assignments by two or more members of the same partnership. Possibly section 63(1) is extensive enough to convey jurisdiction in this respect.

Consolidation of joint and separate estates.

Section 69(3) refers to the consolidation of proceedings where there are petitions against two partners. Consolidation of proceedings in the case of the joint and separate estate of one partner falls under section 51(3).

Actions by trustee and bankrupt's partner.

70 (1) Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence

<sup>8</sup> *Per* Vaughan Williams, L.J., in *Ex parte O. R. in re Abbott* (1894), 1 Q. B. 442; 63 L. J. Q. B. 253; 10 Mor. 306.

<sup>9</sup> *Ex parte O. R. in re Abbott, supra*.

<sup>10</sup> *Ex parte Mackenzie in re Helliwell* (1872), L. R. 20 Eq. 758; 44 L. J. Bank. 117. In this case which was under section 102 of the Act of 1869 the separate petition was consolidated with the joint petition. Contrast *Ex parte Green in re Dales* (1858), 27 L. J. Bank. 32; 3 DeG. & J. 50; *Ex parte Haines* (1858), 27 L. J. Bank. 33; 3 DeG. & J. 58.

<sup>1</sup> *Ex parte Mackenzie in re Helliwell, supra*.



the action shall be given to him, and he may show cause against it, and on his application, the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs. Section 70

- (2) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the court may direct. Actions in name of firm.
- (3) Where a bankrupt or authorized assignor is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt or authorized assignor. Action on joint contracts.

**Cross References Act:** Firm may act by any of its members, 85; limited partnerships, 76; authorized assignor defined, 2(g).

**Cross References Rules:** Effect of receiving order against firm, 94; liability of limited partners, 95.

**Analogous Legislation:** English Acts, 1914, ss. 117, 119, 118; 1883, ss. 113, 115, 114; 1869, s. 112.

The true meaning of section 70(2) is that if persons have been partners in a business then bankruptcy proceedings can be taken against them in the partnership name; and this right is not to be cut down either by the secret dissolution of the partnership or by Rule 94, which is an enabling rule<sup>2</sup>.

The words "being partners" in section 70(2) are intended to mean "who have carried on business in

<sup>2</sup> *Per Alverstone, M.R., in Wenham v. Battams* (1900), 2 Q. B. 698; 69 L. J. Q. B. 803; 7 Mans. 309, at 705. See, however, *per Collins, L.J., S.C., at 709.*



**Section 71** partnership for the purpose of the liability which is sought to be enforced"<sup>3</sup>.

Where two partners suing as a firm obtain judgment against a debtor and then dissolve partnership, the petition is correct in form if it purports to be presented by the two late partners in respect of the joint debt and is signed by one of the partners on behalf of himself and the other<sup>4</sup>.

Enforcement  
of orders of  
courts  
throughout  
Canada.

71 (1) Any order made by a court exercising jurisdiction in bankruptcy under this Act in any province of Canada shall be enforced in the courts having jurisdiction in bankruptcy in all other provinces of Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

Courts to be  
auxiliary to  
each other.

(2) All courts having jurisdiction in bankruptcy in all provinces of Canada and the officers of such courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and in proceedings under authorized assignments, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

Trial of  
issue, etc.

(3) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of such judge or officer shall be subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior

<sup>3</sup> *Per Alverstone, M.R., in Wenham v. Battams, supra*, at 705.

<sup>4</sup> *In re and ex parte Hobbs* (1892), 66 L. T. 144.



court, when the appeal shall be under section Section 71  
seventy-four of this Act. Appeal.

**Cross References Act:** Courts of bankruptcy, 63; review and appeal, 74; transfer of proceedings from one court to another, 11(4).

**Cross References Rules:** Orders of court to be enforced as if a judgment, 53; directions for trial of a question or issue, 120; proceedings after trial of disputed question, 90.

**Cross References Forms:** Order of transfer of proceedings, 16.

**Analogous Legislation:** English Acts, 1914, ss. 121, 122; cf. 105(3) (4); 1883, ss. 117, 118, 102; (1869), ss. 73, 74; *Winding Up Act* (1906), ss. 127, 125, 110.

Section 71(3) was first enacted by *The Bankruptcy Act Amendment Act* 1920.

Section 122 of the English Act of 1914 should be read with section 71.

That section reads:

122. The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

It has been held in England that as between Eng-Whether  
land and Scotland, section 117 of the English Act of section 71(1)  
1883, which is analogous to section 71(1) above, affects relates to  
procedure only. In that particular case it was said procedure  
that the Scottish law with respect to relation back only.  
could not be invoked in England, so as to deprive a  
creditor of the fruits of his diligence in England<sup>6</sup>, for  
once a garnishee order or a receiver has been obtained  
in England the debtor himself could not have assigned  
the property<sup>6</sup>.

The procedure to be followed in enforcing an order Procedure  
of another court in proceedings under *The Winding-up* under  
*Act* is indicated in that statute<sup>7</sup>. The practice in Winding-up  
Acts.

<sup>6</sup> *Galbraith v. Grimshaw* (1910), A. C. 508; 79 L. J. K. B. 1011; 17 Mans. 183.

<sup>6</sup> *Singer & Co. v. Fry* (1915), 2 H. B. R. 115.

<sup>7</sup> See section 126.



**Section 71** Ontario in making orders rules of Court is to take the order properly evidenced to the central office, the judgment branch, where it is entered in the proper books as a judgment or order<sup>8</sup>. In New Brunswick the order is filed with the registrar and may then without any formal order be entered by him as a judgment<sup>9</sup>. The practice in Ireland under the similar section of *The English Companies Act* is that a formal order of the Irish Court is not necessary to make an English order an order of the Irish Court<sup>10</sup>.

**Jurisdiction under 71(2).** There is no jurisdiction under section 71(2) for a bankruptcy court properly seized of a matter to require another court to do its ordinary work<sup>11</sup>.

Under section 117 of the Act of 1883, the English court has made an order for the arrest of a bankrupt against whom the Scotch court had issued a warrant of arrest<sup>1</sup>.

See as to the enforcement of an order for costs, *Re Bell*<sup>2</sup>.

**Only courts of bankruptcy can be auxiliary.** Courts which have no bankruptcy jurisdiction can not act as auxiliary to a Court of Bankruptcy under this section<sup>3</sup>.

Applications under section 71(2) will normally be made to the registrar<sup>4</sup>.

Where an Australian bankruptcy act vests in the trustee all the property of the debtor wheresoever situate, an English court on application to it under the section corresponding with 71(2) would, as a matter of course, act in aid of the Australian court as regards property in England<sup>5</sup>.

<sup>8</sup> *In re Dominion Cold Storage Co., Lowrey's Case* (1898), 18 P. R. 68.

<sup>9</sup> *In re Sovereign Bank* (1915), 43 N. B. R. 519.

<sup>10</sup> *In re Companies Act and Hercules Insurance Co.* (1871), 6 Ir. R. Eq. 207. The English practice requires a formal order; *In re Hollyford Copper Mining Co.* (1869), L. R. 5 Ch. 93; *In re City of Glasgow Bank* (1880), 14 Ch. D. 628.

<sup>11</sup> *In re Huntilly ex parte Goldstein* (1917), 14 B. R. 209.

<sup>1</sup> *Ex parte Craig in re Dobson*, W. N. 1903, p. 155.

<sup>2</sup> (1885), 2 Mor. 291.

<sup>3</sup> *Callender Sykes & Co. v. Colonial Secretary of Lagos* (1891), A. C. 460; 60 L. J. P. C. 33.

<sup>4</sup> *In re Firbank ex parte Knight* (1887), 4 Mor. 50.

<sup>5</sup> *In re Levy's Trusts* (1885), 30 Ch. D. 119; 54 L. J. Ch. 968. See on the question of concurrent bankruptcies, *In re and ex parte Robinson* (1883), 22 Ch. D. 816; *Ex parte Vizianagaram Co., In re*



It has been held under *The Winding-up Act* that the Dominion Parliament has jurisdiction to empower the court to refer and delegate to any officer of the court any of the powers conferred upon the court by the Act<sup>6</sup>. Section 72  
Sec. 71(3).

72. (1) The court may by warrant direct the seizure or search in behalf of the trustee under a receiving order or authorized assignment, of or for any part of the property of the debtor, whether in possession of the debtor or of any other person, and for that purpose the breaking open of any building or place where the debtor or any part of his property is believed to be. Search  
warrants.
- (2) Any warrant of a court having jurisdiction in bankruptcy may be enforced in any part of the Dominion of Canada in the manner prescribed or in the same manner and subject to the same privileges in, and subject to which, a warrant issued by any justice of the peace under or in pursuance of the *Criminal Code* may be executed against a person for an indictable offence. Enforcement  
of warrants.

**Cross References Act:** Courts of bankruptcy, 63; arrest of debtors, 55; warrant for apprehension and examination of debtors and others, 56; commitment to prison, 73.

**Cross References Rules:** To whom warrant to be addressed, 44; duty of sheriff and other officers, 45; custody and production of debtor, 45, 47; execution of warrant, 46; suspension of order of committal, 48; provincial rules, 49.

**Cross References Forms:** Warrant for committal for contempt, 58; warrant of seizure, 60; warrant of arrest against debtor, 61.

**Analogous Legislation:** English Acts, (1914), s. 123; (1883), s. 119.

Section 72 is given in the form in which it was en-

*McFadyen & Co.* (1908), 1 K. B. 675. 677; 77 L. J. K. B. 319; 15 Mans. 28; *In re and ex parte McCulloch* (1880), 14 Ch. D. 716; *In re Anderson* (1911), 1 K. B. 896; 80 L. J. K. B. 919; 18 Mans. 218; *Ex parte James in re O'Reardon* (1873), L. R. 9 Ch. 74; 43 L. J. Bank. 13.

<sup>6</sup>*In re Farmer's Bank of Canada, Lindsay's Case* (1916), 28 D. L. R. 328; 85 O. L. R. 470.



**Section 73** acted by section 47 of *The Bankruptcy Act Amendment Act, 1921*. The previous section read:—

72. (1) Any warrant of a court having jurisdiction in bankruptcy may be enforced in any part of the Dominion of Canada in the same manner and subject to the same privileges in, and subject to which, a warrant issued by any justice of the peace under or in pursuance of the *Criminal Code* may be executed against a person for an indictable offence.

(2) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

Commitment  
to prison.

73. Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed, he shall be liable for every such refusal to a fine not exceeding five hundred dollars.

**Cross References Act:** Arrest of debtors, 55; warrant for apprehension and examination of debtors and others, 56; enforcement and execution of warrant, 72.

**Cross References Rules:** To whom warrant may be addressed, 44; duty of sheriff and other officers, 52; custody and production of debtor, 45, 47; execution of warrant, 46; suspension of order of committal, 48; provincial rules, 49.

**Cross References Forms:** Warrant for committal for contempt, 58; warrant of seizure, 60; warrant of arrest against debtor, 61.

**Analogous Legislation:** English Acts, 1914, s. 124; (1883), s. 120.

Section 27 of *The Interpretation Act*, R. S. C. 1906, c. 1, reads:

Imprison-  
ment,  
where.

27(1) If, in any Act, any person is directed to be imprisoned or committed to prison, such imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the common gaol of the locality in which the order for such imprisonment is made, or if there is no common gaol there, then in or to that common gaol which is nearest to such locality.

Keeper of  
gaol, duties  
of.

(2) The keeper of any such common gaol shall receive such person, and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed, in cases in which bail may, by law, be taken.



*Review and Appeal.*

- 74 (1) Every court having jurisdiction in bankruptcy under this Act may review, Section 74  
Court may review, etc. rescind or vary any order made by it under its bankruptcy jurisdiction.
- (2) Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may,— Appeals in bankruptcy.
- (a) if the question to be raised on the appeal involves future rights; or,
  - (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,
  - (c) if the amount involved in the appeal exceeds five hundred dollars; or,
  - (d) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars;
- appeal to the Appeal Court.
- (3) The decision of the Appeal Court upon any such appeal shall be final and conclusive Supreme Court of Canada. unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court.
- (4) The Supreme Court of Canada shall have Jurisdiction. jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.
- (5) No such appeal to the Supreme Court of Canada shall operate as a stay of proceedings No stay of proceedings unless ordered. unless the judge who permits such appeal shall so order, and to the extent to which he shall order, and the appellant shall not be required to provide any security for costs, but unless he provides security for costs, in an amount to be fixed by the judge permitting the appeal, he shall not be awarded costs in the event of his success upon such appeal.



## Section 74

Decision  
final.

(6) The decision of the Supreme Court of Canada on any such appeal shall be final and conclusive.

**Cross References Act:** Courts having jurisdiction in bankruptcy, 63; discharge of debtor, 58; jurisdiction of Appeal Court, 63(3); Appeal Court defined, 2(c); appeals from registrar, 65(4).

**Cross References Rules:** Appeals to Appeal Court, 68-71; appeals to Supreme Court, 72-73; appeals from registrar, 67; appeal from decision of trustee on rejection of proof, 117; appeal to Appeal Court on disposition of application for discharge, 136.

**Analogous Legislation:** *Winding Up Act*, 1906, ss. 101, 102; *English Act*, 1914, s. 108.

## ANALYSIS OF NOTES.

What court may review, rescind or vary.  
Circumstances under which the court will rehear.  
*Ex parte* orders not appealed against.  
Review of order refusing discharge.  
Rescinding receiving order.  
Appeal from rehearing.  
Right of appeal under English Act.  
And under *Winding Up Act*.  
Who may appeal.  
Meaning of the words "the court or a judge."  
Right of appeal exists only in cases within section 74.  
Meaning of "future rights."  
When the amount involved exceeds five hundred dollars.  
Exercise of powers by Appeal Court.  
Appeal to Supreme Court of Canada.  
Abandonment of appeal.

What court  
may review,  
rescind or  
vary.

If the registrar makes the order he alone is the court which can review, rescind or vary it; and the same is true of the judge and of the Appeal Court<sup>7</sup>. There fore where a registrar has incorrectly drawn up an order made by a judge he has no jurisdiction to alter it; it must be corrected by the judge<sup>8</sup>. And an order made by a judge not in exercise of his bankruptcy jurisdiction cannot be rescinded or varied by him in pursuance of the jurisdiction given him under *The Bankruptcy Act*<sup>9</sup>. A similar rule pertained under *The Winding-up Act*; for the order of a judge in charge of wind-

<sup>7</sup> *Per* A. L. Smith, J., *In re and ex parte Maugham* (1888), 21 Q. B. D. 21; 57 L. J. Q. B. 487; 5 Mor. 152; *cf. Ex parte Mackay in re Jeavons* (No. 2) (1873), L. R. 9 Ch. 127; 43 L. J. Bank. 105; where the Registrar was sitting as chief judge.

<sup>8</sup> *In re Beard ex parte Lewis* (1893), 10 Mor. 178; 69 L. T. 259.

<sup>9</sup> *In re Suffield & Watts ex parte Brown* (1888), 20 Q. B. D. 693; 5 Mor. 83.



ing-up proceedings could not be varied or rescinded by another judge, even though the first order was made in excess of the judge's jurisdiction under *The Winding-up Act*<sup>10</sup>. Section 74

The Court ought not to be asked to re-hear on the same materials as were before it on the previous occasion<sup>1</sup> unless the previous order was made under a clear misapprehension of the real state of affairs<sup>2</sup>. The fact that an appeal is pending from an order made does not deprive the Court of the jurisdiction to rehear the case<sup>3</sup>, nor does the fact that the time limited for appealing has expired, though that may be a reason inducing the court to require special grounds before allowing a re-hearing<sup>4</sup>. The court should not grant a re-hearing for the sole purpose of enabling an appeal to be brought which would otherwise have been too late<sup>5</sup>. Where a bankrupt appears in the Court below and does not object to an order of adjudication the court may consider that he is prevented from coming forward to ask for a re-hearing, even though the ground of the application is that there was no jurisdiction to make the order<sup>6</sup>. *Semble*, leave for a re-hearing or review should not be given *ex parte*<sup>7</sup>. Circumstances under which the court will rehear.

Where an order has been made *ex parte* the person

<sup>10</sup> *Per* Barker, McLeod and Gregory, J.J., in *Re The Cushing Sulphite Fibre Co., Ltd.* (1906), 38 N. B. R. 581, *contra* Tuck, C.J., and Hanington, J.; *Pontbriand Co. v. Cosky* (1912), 14 Que. P. R. 19; *In re Lake Superior Copper Co., Ltd. in re Plummer* (1885), 9 O. R. 277.

<sup>1</sup> *Per* Osler, J.A., in *re The Equitable Savings Loan and Building Association* (1903), 6 O. L. R. 26, at 31.

<sup>2</sup> *Ibid*, *per* MacLennan, J.A., at 33; *per* Cave, J., in *re Aysford ex parte Lovering* (1887), 4 Mor. 164; 35 W. R. 652.

<sup>3</sup> *Ex parte Keighley in re Wike* (1874), L. R. 9 Ch. 667; 44 L. J. Bank. 13. A registrar may re-hear a case although his order has been appealed from and varied by the Court of Appeal if the special point to be re-heard was not dealt with on the appeal: *Ex parte Mackay in re Jeavons*, *supra*.

<sup>4</sup> *Ex parte Ritso* (1883), 22 Ch. D. 529; 52 L. J. Bank. 535; *Ex parte Brown in re Jeavons* (1874), L. R. 9 Ch. 304; 43 L. J. Bank. 105; *cf.* *In re and ex parte May* (1884), 12 Q. B. D. 497; 53 L. J. Q. B. 571; 50 L. T. 744; 1 Mor. 50.

<sup>5</sup> *Ex parte Simmons in re Lister* (1876), 2 Ch. D. 749; 45 L. J. Bank. 113; 34 L. T. 744; *In re Tobias and Co. ex parte Tobias* (1891), 1 Q. B. 463; 60 L. J. Q. B. 244; 8 Mor. 30.

<sup>6</sup> *In re and ex parte May*, *supra*.

<sup>7</sup> *Ex parte Ritso* (1883), 22 Ch. D. 529; 52 L. J. Bank. 535; *In re and ex parte Lloyd* (1889), 6 Mor. 297; 62 L. T. 366.



## Section 74

*Ex parte*  
orders not  
appealed  
against.

Review of  
order refus-  
ing dis-  
charge.

affected by it should not appeal, but should apply to the court which made it to have it reviewed, rescinded or varied<sup>8</sup>.

Where the discharge of a bankrupt has been refused absolutely such bankrupt may not apply to the court *de novo* for an order of discharge, but should apply for a review of the order<sup>9</sup>. On such an application the bankrupt must make out a *prima facie* case for review. If the court considers that these are *prima facie* grounds for a review any person dissatisfied should appeal at once from the determination to review the order and not wait until the order has been brought up for review before appealing<sup>10</sup>.

Rescinding  
receiving  
order.

There is jurisdiction under section 74(1) to rescind a receiving order<sup>1</sup>. Whether or not the jurisdiction should be exercised is a matter of judicial discretion<sup>2</sup>.

Appeal from  
rehearing.

When there has been a re-hearing but no variation of the original order, an appeal will lie from the order made on the re-hearing, even though the time for appealing from the original order has gone by<sup>3</sup>; similarly when there has been a variation<sup>4</sup>.

Right of  
appeal under  
English  
Act.

The section of the English Act<sup>5</sup> corresponding with section 74(2) is both narrower and wider than that section. It is narrower in that a right of appeal is

<sup>8</sup> *Ex parte Goldstein in re a Debtor* (1917), 1 K. B. 558; 86 L. J. K. B. 705; 116 L. T. 379; distinguishing *In re Gold Co.* (1879), 12 Ch. D. 77, and following *In re North Australian Territory Co.* (1890), 45 Ch. D. 87, 93. See *In re Central Bank of Canada* (1897), 17 P. R. 370. Contrast *per Osler, J.A.*, *In re The Equitable Savings Loan and Building Association* (1903), 6 O. L. R. 26, at 31, and see *McNabb v. Oppenheimer* (1885), 11 P. R. 214. A winding-up order is not a judgment *in rem*, and if made improperly is not binding on strangers; *In re Bowling and Webley's Contract* (1895), 1 Ch. 663; 64 L. J. Ch. 427; 2 Mans. 257.

<sup>9</sup> *In re Tobias and Co. ex parte Tobias* (1891), 1 Q. B. 463; 60 L. J. Q. B. 244; 8 Mor. 30.

<sup>10</sup> *In re and ex parte Lloyd, supra*; *in re Tobias and Co. ex parte Tobias, supra*.

<sup>1</sup> *In re and ex parte Wemyss* (1884), 13 Q. B. D. 244; 53 L. J. Q. B. 496; 1 Mor. 157; compare section 62(1).

<sup>2</sup> *In re and ex parte Leslie* (1887), 18 Q. B. D. 619; 4 Mor. 75; 56 L. T. 569; *In re Izod ex parte O. R.* (1898), 1 Q. B. 241; 67 L. J. Q. B. 111; 77 L. T. 640; 4 Mans. 343.

<sup>3</sup> *In re and ex parte Ashworth and Outram* (1893), 10 Mor. 175; 69 L. T. 259; *Ex parte Keighley in re Wike* (1874), L. R. 9 Ch. 667; 44 L. J. Bank. 13; *Ex parte Brown in re Jeavons* (1874), L. R. 9 Ch. 304; 43 L. J. Bank. 105; 30 L. T. 108.

<sup>4</sup> *In re Bishop ex parte Clapton* (1891), 8 Mor. 221.

<sup>5</sup> Section 108(2).



only conferred on a person "aggrieved" and not on one dissatisfied<sup>6</sup>; it is wider in that it contains no provisions corresponding with subsections (a)(b)(c)(d) of section 74(2). Section 74

It is important also when considering cases under *The Winding-up Act* to remember that a material difference exists between section 101 of that Act and section 74(2). The two sections are practically identical except that under *The Winding-up Act* the dissatisfied person may only appeal by leave of a judge of the court appealed from<sup>7</sup>. This gave power under *The Winding-up Act* to exercise some check on appeals. It has been said that section 101 of *The Winding-up Act* intends the decision of a judge to be final unless in the opinion of the judge applied to there is some ground for allowing the litigation to be prolonged<sup>8</sup>. The matters in regard to which an appeal is contemplated by section 101 were substantial matters of property or rights arising in the winding-up proceeding. They did not include contests as to which creditor should issue the order or what solicitor should secure the casual advantages resulting from the carriage of the order<sup>9</sup>. It is considered that the policy of *The Bankruptcy Act* is that in cases not falling within sub-headings (a)(b)(c)(d) of section 74(2), it is better that there should be an end of the litigation and a speedy distribution of the estate rather than the delay and expense necessarily incident to an appeal<sup>10</sup>. And under Winding-up Act.

There is no rule in bankruptcy to the effect that only those persons may appeal who have been re- Who may appeal.

<sup>6</sup> See as to what in England constitutes a "person aggrieved": per James, L.J., *In re and ex parte Sidebotham* (1879), 14 Ch. D. 458, 465; 49 L. J. Bank. 41.

<sup>7</sup> Under the *Winding Up Act* a judge other than the judge directing the winding-up proceedings may grant leave to appeal from an order of that judge: *In re The Cushing Sulphite Fibre Co., Ltd.* (1906), 38 N. B. R. 581. though the normal practice would be to apply to the judge making the order objected to, per Boyd, C., *In re Belding Lumber Co.* (1911), 23 O. L. R. 255, at 257. But under *The Bankruptcy Act*, s. 64(3), only the judge assigned by the Minister of Justice or by the Chief Justice can exercise the bankruptcy jurisdiction conferred.

<sup>8</sup> *In re Ontario Bank* (1917), 12 O. W. N. 245.

<sup>9</sup> *In re Belding Lumber Co.* (1911), 23 O. L. R. 255.

<sup>10</sup> *In re McGill Chair Co.* (1912), 5 D. L. R. 393.



**Section 74** presented in the court below. Whether such persons should apply for a re-hearing or by way of appeal may perhaps depend on the facts of each case<sup>1</sup>.

Meaning of the words "the court or a judge."

When considering the scope of the words "any person dissatisfied with an order or decision of the Court or a judge" in section 74(2), the effect of section 65(4) providing that any person dissatisfied with an order or decision of the registrar may appeal therefrom to a judge, should not be overlooked<sup>2</sup>.

Right of appeal exists only in cases within section 74.

The right of appeal exists only in cases falling within section 74. Where no right of appeal is there given the decision is final<sup>3</sup>. Conversely no appeal can be brought under the Act in a matter which is not a "proceeding" under the Act<sup>4</sup>. The expressed conclusion of a judge which is capable of being embodied in an order is an order for the purpose of appeal<sup>5</sup>. No appeal lies from an order granting leave to appeal<sup>6</sup>, but if it is a question whether the conditions existed enabling the leave to be granted, then the court may treat the right to appeal as being established<sup>7</sup>.

Meaning of "future rights."

It has been said that the words "future rights" should be given a wide interpretation<sup>8</sup>, and *seem* an order giving leave to bring an action for an ordinary money claim after the receiving order has been made may affect future rights<sup>9</sup>; but an order giving leave to serve a summons *ex juris* in an action of misfeasance against directors of a company being wound up is not

<sup>1</sup> *In re and ex parte Michael* (1891), 8 Mor. 305.

<sup>2</sup> See sections 2(1), 63, 65(1).

<sup>3</sup> *In re Sarnia Oil Co.* (1893), 15 P. R. 347; *In re McLean, Stinson & Brodie, Ltd.* (1911), 18 O. W. R. 163; 2 O. W. N. 435.

<sup>4</sup> *Arnold v. Dominion Trust Co.* (1918), 56 S. C. R. 433.

<sup>5</sup> *In re Jones* (1868), 4 P. R. 317.

<sup>6</sup> *Per Hodgins, J.A., In re J. McCarthy & Sons Co. of Prescott, Ltd.* (1916), 38 O. L. R. 3; 32 D. L. R. 441, at p. 7, quoting *Ex parte Stevenson* (1892), 1 Q. B. 394, 609; *In re Central Bank of Canada* (1897), 17 P. R. 395.

<sup>7</sup> *Per Hodgins, J.A., ibid.*, citing *Gillett v. Lumsden* (1905), A. C. 601; *Townsend v. Northern Crown Bank* (1913), 4 O. W. N. 1245; *In re Ketcheson and Canadian Northern Ontario R. W. Co.* (1913), 5 O. W. N. 271, 350.

<sup>8</sup> *Per Meredith, C.J.C.P., In re J. McCarthy & Sons Co. of Prescott, Ltd.*, *supra*, citing *In re Union Fire Insurance Co.* (1886), 13 O. A. R. 268, 295; *Shoolbred v. Union Fire Insurance Co.* (1886), 14 S. C. R. 624; *In re Toronto Cream and Butter Co., Ltd.* (1909), 14 O. W. R. 81.

<sup>9</sup> *In re J. McCarthy & Sons Co. of Prescott, Ltd.*, *supra*.



a matter affecting future rights, but is a mere matter of practice and procedure<sup>10</sup>. Section 74

A winding-up order or an order refusing to make a winding-up order involves future rights and are therefore appealable<sup>1</sup>.

The amount in the appeal does not exceed five hundred dollars when the amount due from each contributory is less than five hundred dollars, but the aggregate of the amounts due from the settled list of contributories exceeds that sum<sup>2</sup>. The amount involved in the appeal is the amount of the judgment against which it is sought to appeal and not the interest of the appellant in the judgment<sup>3</sup>, or the amount demanded in the proceedings<sup>4</sup>. No amount is involved in an order refusing to set aside an order for service *ex juris* in a misfeasance suit against directors of a company in liquidation under the Act<sup>5</sup>. A judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot on that ground be granted<sup>6</sup>. Interest and costs may not be included to make up the amount of five hundred dollars required by the section<sup>7</sup>.

When the amount involved exceeds five hundred dollars.

Where a receiving order is made on appeal, it may be dated as if it had been made on the application appealed from<sup>8</sup>, but for purposes of section 32 the date of the receiving order is the date on which it was made and not the date it bears<sup>9</sup>. Where on appeal against the making of a receiving order, the Appeal Court

Exercise of powers by Appeal Court.

<sup>10</sup> *Brown v. Caldwell* (1918), 2 W. W. R. 229.

<sup>1</sup> *Per Osler, J.A., In re Union Fire Insurance Co.* (1886), 13 O. A. R. 268, at 295; *Marsden v. Minnekahda Land Co.* (1918), 40 D. L. R. 76; contrast *In re Elliott & Sons, Ltd.* (1915), 9 O. W. N. 51.

<sup>2</sup> *Stephens v. Gerth et al.*; *In re Ontario Express and Transportation Co.* (1895), 24 S. C. R. 716.

<sup>3</sup> *Per Anglin, J., In re Great Northern Construction Co., Ross v. McRae* (1916), 53 S. C. R. 128; and see *per Idington, J., S.C.*, contrast *per MacLaren, J.A., In Townsend v. Northern Crown Bank* (1913), 4 O. W. N. 1245.

<sup>4</sup> *Ibid.*, *per Brodeur, J.*

<sup>5</sup> *Brown v. Caldwell* (1918), 2 W. W. R. 229.

<sup>6</sup> *Cushing Sulphite Fibre Co. v. Cushing* (1906), 37 S. C. R. 427.

<sup>7</sup> *Dufresne v. Guevremont* (1896), 26 S. C. R. 216; *Wiarton Beet Root Sugar Co., Kydd's Case* (1905), 6 O. W. R. 590.

<sup>8</sup> *In re Raatz ex parte Carlhian* (1897), 4 Mans. 50; 76 L. T. 330.

<sup>9</sup> *In re Teale ex parte Blackburn* (1912), 2 K. B. 367; 81 L. J. K. B. 1243; 19 Mans. 327.



**Section 74** strikes out all reference in the order to one of two alleged acts of bankruptcy, *e.g.* the giving of an alleged fraudulent bill of sale, notice of the receiving order must be re-gazetted<sup>10</sup>. Where a discretion is given to the court the exercise of the discretion on proper principles will not generally<sup>1</sup> be interfered with on appeal; *aliter* where the principle properly applicable was not applied<sup>2</sup>.

Appeal to  
Supreme  
Court of  
Canada.

It was held under *The Winding-up Act* that leave would not be given to appeal to the Supreme Court of Canada though the amount in controversy exceeded \$2,000 if neither an important principle of law nor the construction of a public act nor a question of public interest were involved<sup>3</sup>.

Abandon-  
ment of  
appeal.

It has been held in England that where an appeal has been lodged and the appellant desires to abandon it, the proper order is that it be dismissed with costs, not that it be allowed to be withdrawn<sup>4</sup>.

<sup>10</sup> *In re a Debtor ex parte a Person Aggrieved* (1912), 106 L. T. 344.

<sup>1</sup> *In re The Cushing Sulphite Fibre Co., Ltd.* (1906), 38 N. B. R. 581.

<sup>2</sup> *In re J. McCarthy & Sons Co. of Prescott, Ltd.* (1916), 38 O. L. R. 3; 32 D. L. R. 441.

<sup>3</sup> *Riley v. Curtis's and Harvey, Ltd.* (1920), 59 S. C. R. 206.

<sup>4</sup> *In re Downing ex parte Mardon* (1891), 8 Mor. 302.



## PART VII.

*Supplemental Provisions.*

75. Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property shall have effect as though she were personally bound to pay the judgment debt or sum ordered to be paid.

Section 75

Married woman.

**Cross References Act:** Debtor defined, 2(o); judgment, execution and attachment in case of married woman, 2(v); husband a restricted creditor, 48(1).

Sections 2(o), 2(v) and the notes thereunder should be read with section 75.

Business is wider than trade. Farming is a business but not a trade<sup>5</sup>.

The letting on one occasion of two rooms in a house in response to an advertisement is not the carrying on of a trade or business<sup>6</sup>; but the promotion of companies to take over hotels may be a business within the section<sup>7</sup>. One transaction may be evidence of a carrying on of a trade<sup>8</sup>.

A person who has been trading is deemed a trader until he has paid all the debts and obligations<sup>9</sup> relating to his trade<sup>10</sup>. *A fortiori* if he not only omits to pay

<sup>5</sup> *Harris v. Amery* (1865), L. R. 1 C. P. 148, 154; *In re Long* (1905), 2 I. R. 343. As to farming see section 8.

<sup>6</sup> *Ex parte Plant in re Parkinson* (1893), 9 T. L. R. 388.

<sup>7</sup> *In re Clark ex parte Pope and Owles* (1914), 3 K. B. 1095; 84 L. J. K. B. 89; 1 H. B. R. 1.

<sup>8</sup> *In re Clark ex parte Pope and Owles*, *supra*, at 1104, 1110.

<sup>9</sup> Such as a liability in tort for the negligence of a servant: *In re Allen ex parte Shaw* (1915), 1 K. B. 285; 84 L. J. K. B. 271; 1 H. B. R. 39.

<sup>10</sup> *In re Clark ex parte Pope and Owles*, *supra*; *In re Dagnall ex parte Soan & Morley* (1896), 2 Q. B. 407; 65 L. J. Q. B. 666; 3 Mans. 218.



**Section 77** his trade debts but continues to get in the assets of the business<sup>11</sup>.

An unmarried woman who marries and continues to trade is within the section; as may be an administratrix who carries on her father's business<sup>1</sup>.

Application  
to limited  
partnerships.

76. Subject to such modifications as may be made by General Rules, the provisions of this Act shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership being adjudged bankrupt or making an authorized assignment, the assets of the limited partnership shall vest in the trustee.

**Cross References Act:** Person includes partnership, 2(aa); ranking of debts in case of partnership, 28(2); dividend out of separate property, 37(4); dividends on joint and separate properties to be declared together, 37(5); proof in respect of distinct contracts, 47; restricted creditors in case of partnership, 48(3); applicability of joint and separate estate, 51(3); order of discharge not to release partner, 61(3); consolidation and conduct of proceedings in partnership cases, 69; actions in name of partner or firm, 70; firm may act by any of its members, 85.

**Cross References Rules:** Effect of a receiving order against a firm, 94; rights and liabilities of limited partners, 95.

**Analogous Legislation:** English Acts (1914), s. 127; (1913), s. 24.

Evidence of  
proceedings  
at meetings  
of creditors.

77 (1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

Evidence of  
regularity.

(2) Until the contrary is proved, every meeting of creditors in respect to the proceedings whereof a minute has been so signed, shall be

<sup>11</sup> *In re Reynolds ex parte White Bros., Ltd.* (1915), 2 K. B. 186; 84 L. J. K. B. 1346; 1 H. B. R. 174.

<sup>1</sup> *In re Reynolds ex parte White Bros., Ltd.*, *supra*.



deemed to have been duly convened and held and all resolutions passed or proceedings thereat to have been duly passed or had. Section 78

(3) A copy of the *Canada Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice. Evidence of facts in notice.

(4) The production of a copy of the *Canada Gazette* containing any notice of a receiving order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date. Evidence of receiving order.

**Cross References Act:** Meetings of creditors, 42; minutes to be kept, 42(8); notice to be gazetted of R. O. & A. A., 11(4); notice of appointment of new trustee, 15(3); notice of order of discharge, 61(5); notice of order annulling bankruptcy, 62(3).

**Cross References Rules:** Meetings of creditors, 112-114.

**Analogous Legislation:** English Acts (1914), ss. 138, 137; (1883), ss. 133, 132; *Canada Evidence Act*, R. S. C. (1906), c. 145, s. 30.

The phrase "a receiving order adjudging a debtor bankrupt" in section 77(4) is perhaps a little condensed. See section 4(5).

The production of the copy of the *Canada Gazette* referred to in section 77(4) is conclusive evidence not only as between the trustee and the bankrupt but also as between the trustee and third parties<sup>2</sup>.

The words "legal proceedings" in section 77(4) do not include proceedings for the purpose of questioning or annulling an adjudication<sup>3</sup>.

78. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit Evidence of proceedings in bankruptcy.

<sup>2</sup> *Ex parte Learoyd in re Foulds* (1878), 10 Ch. D. 3; 48 L. J. Bank. 17, and see *Boaler v. Power* (1910), 2 K. B. 299; 79 L. J. K. B. 486; 17 Mans. 125.

<sup>3</sup> *Ex parte Geisel in re Stanger* (1882), 22 Ch. D. 436, 439, 440; 53 L. J. Ch. 349; *per Cotton*, L.J., 439-450.



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**Section 79**

or document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

**Cross References Act:** Petition, 4; order of discharge, 58; order annulling adjudication, 62; seal of court, 80; evidence of proceedings at meetings of creditors, 77(1); evidence of facts in notice in *Canada Gazette*, 77(3); evidence of receiving order in *Canada Gazette*, 77(4); "in all legal proceedings," 77(4).

**Analogous Legislation:** English Acts (1914), s. 139; (1883), s. 134.

On a motion to stay proceedings under an attachment issued after the making of a winding-up order, proof of the making of the winding-up order may be made, in Nova Scotia at least, by the affidavit of the liquidator appointed by the Supreme Court of New Brunswick. It is not necessary to produce a certified or sealed copy of the winding-up order<sup>4</sup>.

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Swearing of  
affidavits.

79. Subject to General Rules, any affidavit to be used in a court exercising jurisdiction in bankruptcy under this Act may be sworn before any person authorized to administer oaths in the court having jurisdiction or before any registrar of the court or before any officer of a court having jurisdiction in bankruptcy authorized in writing in that behalf by the court, or before a justice of the peace for the province, county or place where it is sworn, or, in the case of a person who is out of Canada, before a notary public, a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides, he being certified

<sup>4</sup> *Salter v. St. Lawrence Lumber Co., Ltd.* (1896), 28 N. S. R. 335.



to be a magistrate or justice of the peace or qualified as aforesaid by a British consul or vice-consul or by a notary public. Sections  
80, 81

**Cross References Act:** Courts exercising jurisdiction in bankruptcy, 63; barristers, solicitors and advocates to be officers of the courts, 87(2).

**Cross References Rules:** Affidavit other than proof for debt, not to be sworn before the solicitor acting for the party on whose behalf it is to be used, 31; general rules with respect to affidavits, 26-33, 152.

**Analogous Legislation:** English Acts (1914), s. 140; (1883), s. 135; Canadian Act (1875), s. 105; *Winding Up Act*, R. S. C. (1906), c. 144, s. 145. See R. S. C. 1906, c. 145. *The Canada Evidence Act* *passim*, and particularly ss. 13, 14, 27, 35, 36.

The notarial certificate referred to in the last three lines of the section is only required when such an affidavit is sworn before a foreign functionary°.

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80. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of any such court in all legal proceedings. Seal of court.

**Cross References Act:** Courts with jurisdiction in bankruptcy, 63; effect of sealing deposition of dead witness, 81; petition order or certificate receivable in evidence when sealed, 78.

**Cross References Rules:** All petitions, warrants and subpoenas issued by the court to be sealed, 10.

**Analogous Legislation:** English Acts (1914), s. 142; (1883), s. 137.

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81. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceedings under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to. Death of  
debtor or  
witness.

<sup>°</sup> *In re and ex parte Magee* (1883), 15 Q. B. D. 332; 54 L. J. Q. B. 394.



**Section 82**      **Cross References Act:** Examination of debtor and others, 56.

**Analogous Legislation:** English Acts (1914), s. 141; (1883), s. 136.

The deposition when properly attested is by this section made admissible after the death of the witness. It may also be used in the lifetime of the witness; for the section is not to be construed as meaning that the depositions are not to be admitted during the lifetime of the debtor or witness<sup>o</sup>.

Computation  
of time.

82 (1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday or a statutory holiday throughout the province where the act or proceeding is to be done or taken or a day on which the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified.

(2) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then, if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which shall not be one of the days in this section specified.

<sup>o</sup> See *R. v. Widdop* (1872), 42 L. J. M. C. 9; L. R. 2 C. C. 3; 27 L. T. 693.



**Cross References Act:** Court may extend time, 68(5); appeal from disallowance of claim, 53(1); execution held by sheriff, 3(e); dividend to be paid within six months, 37(1) Section 83

**Cross References Rules:** Where days not ordered to be clear days, 148; where "clear days" or "at least" or "not less than," 149; where less than six days is limited, 150; where time expires on Sunday or on any day on which the offices of the court are closed, 151.

**Analogous Legislation:** English Acts (1914), s. 145; (1883), s. 141.

The Interpretation Act R. S. C. 1906, c. 1, s. 31(h) reads:

31. In every Act, unless the contrary intention appears,—

(h) If the time limited by any Act for any proceeding, or the doing of any thing under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

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83. All notices and other documents for the service of which no special mode is directed may be sent by registered and prepaid post to the last known address of the person to be served therewith. Service of notices.

**Cross References Act:** Mailing notice of disallowance, 53; service of appointment or summons, 56(2).

**Cross References Rules:** Service on solicitor if left at his address for service, 50; hours of service, 51; service by registered letter, 52.

**Analogous Legislation:** English Acts (1914), s. 146; (1883), s. 142.

Personal service of the summons issued under section 56 is unnecessary; service may be by post<sup>7</sup>. Service of a notice of motion to continue an injunction may be made by post<sup>8</sup>; but *quære* whether service of a notice of motion may be made by post on a stranger to the bankruptcy<sup>9</sup>.

Where service of notice of appeal is made by post the notice must be posted so as to reach the respondent within the time allowed for bringing the appeal<sup>10</sup>. If

<sup>7</sup> *In re Weinberg ex parte Official Receiver* (1907), 96 L. T. 790; 14 Mans. 277.

<sup>8</sup> *Ex parte Mauthner in re Lewis* (1876), 3 Ch. D. 113; 45 L. J. Bank. 125.

<sup>9</sup> *Ex parte Hobbes in re Bates* (1891), 8 T. L. R. 44.

<sup>10</sup> See *In re Faulconer ex parte Cochrane* (1889), 6 Mor. 206; 61 L. T. 56.



**Section 84** this is not done the court will not extend the time unless some special reason exists<sup>1</sup>.

A notice sent to the last known address may be a good notice, even though the trustee is aware that the person sought to be served is no longer at that address<sup>2</sup>.

Sufficient notice of the granting of an injunction may be given by telegram; but if this is all that is done it may be difficult to obtain a committal for contempt<sup>3</sup>.

Formal defect not to invalidate proceedings, or appointment of officials.

84 (1) No proceeding in bankruptcy or under an authorized assignment shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(2) No defect or irregularity in the appointment of an authorized trustee or an inspector shall vitiate any act done by him in good faith.

**Cross References Act:** Amendment of written process or proceedings, 68(4); no advantage to be gained by any mistake, defect or imperfection, 12; presumption of validity of proceedings at meetings, 77(2); conclusive evidence of receiving order, 77(4).

**Cross References Rules:** Non-compliance with rules not to render proceeding void, 146.

**Analogous Legislation:** English Acts (1914), s. 147; (1883), s. 143; (1869), s. 82; *Dominion Winding Up Act*, R. S. C. (1906), c. 144, s. 129.

This section has no application to defects which are matters of substance, as distinguished from merely formal defects. The word "appointment" in section 84(2) may possibly include not only the appointment but also the election of trustees<sup>4</sup>.

<sup>1</sup> See *In re Faulconer ex parte Cochrane*, *supra*, but see *In re and ex parte Arden* (1884), 14 Q. B. D. 121; 51 L. T. 712; 2 Mor. 1 and *cf. Ex parte Kirby in re Alderson* (1891), 8 Mor. 93.

<sup>2</sup> *In re Follick ex parte the Trustee* (1908), 97 L. T. 645.

<sup>3</sup> See *Ex parte Langley in re Bishop* (1879), 13 Ch. D. 110; 49 L. J. Bank. 1.

<sup>4</sup> Compare English Act, 1914, s. 147.



Examples of formal defects or irregularities in petitions or in affidavits accompanying them which the court has permitted to be amended are, insufficient description of the Act of Bankruptcy or other facts relied on<sup>5</sup>; signature of one petitioning creditor not attested<sup>6</sup>; petitioning creditor a mere trustee<sup>7</sup>; omission by petitioning creditor to state his willingness to give up his security<sup>8</sup>; misdescription of petitioner<sup>9</sup>.

Section 84

Formal defects in petition.

For an example of a formal defect in an order of adjudication, see *Oriental Bank v. Richer*<sup>10</sup>, and in a receiving order *Lovell v. Beauchamp*<sup>1</sup>.

Irregularities may be waived in certain cases<sup>2</sup>.

See where liquidators sued in their own name and not that of the company and an amendment was allowed, *Kent v. Communauté*<sup>3</sup>.

Where the application to amend is made at such a point of time that no injustice will be done, *e.g.* before adjudication, when the petition can be ordered to be re-served the amendment may be made<sup>4</sup>.

Where amendment may be made.

Where a petition is amended under an order of the court the judge has a discretion as to requiring the amendment to be verified by affidavit. If the alteration

Verification of amendment by affidavit.

<sup>5</sup> *In re Fiddian, Squire & Co.* (1892), 9 Mor. 95. with which contrast *Ex parte Coates in re Skelton* (1877), 5 Ch. D. 979; *In re and ex parte Dunhill* (1894), 2 Q. B. 234; 63 L. J. Q. B. 686; 1 Mans. 242; *In re Ewart Carriage Works, Ltd.* (1904), 8 O. L. R. 527; *In re Canadian* (No. 2) (1914), 16 D. L. R. 17, with which contrast *In re Kootenay Brewing Co.* (1896), 6 B. C. R. 112; *In re Redpath Motor Vehicle Co.* (1904), 4 O. W. R. 515; *In re Lorrimer ex parte Constable* (1890), 7 Mor. 235; per Darling, J., *In ex parte Barton in re Phillips* (1900), 2 Q. B. 329; 69 L. J. Q. B. 606; 7 Mans. 277.

<sup>6</sup> *Ex parte Blain in re Dean* (1902), 18 T. L. R. 606.

<sup>7</sup> *Ex parte Hinshelwood in re Ellis* (1887), 4 Mor. 283.

<sup>8</sup> *Ex parte Vanderlinden in re Pogose* (1882), 20 Ch. D. 289; 51 L. J. Ch. 760.

<sup>9</sup> *Ex parte Kirkwood in re Mason* (1879), 11 Ch. D. 724. contrast *Ex parte Jerningham* (1878), 9 Ch. D. 466; 47 L. J. Bank. 115.

<sup>10</sup> (1884), 9 A. C. 413; 53 L. J. P. C. 62.

<sup>1</sup> (1894), A. C. 607; 63 L. J. Q. B. 802; 1 Mans. 467; cf. *Ex parte Kibble in re Haynes* (1890), 7 Mor. 50.

<sup>2</sup> *In re and ex parte Yeatman* (1880), 16 Ch. D. 283; *Ex parte Robertson in re Morton* (1875), L. R. 20 Eq. 733; 44 L. J. Bank. 99; *Fry v. Moore* (1889), 23 Q. B. D. 395; 58 L. J. Q. B. 382; see *In re and ex parte Pratt* (1884), 12 Q. B. D. 334; 53 L. J. Ch. 613; 1 Mor. 27; *In re and ex parte May* (1884), 12 Q. B. D. 497; 53 L. J. Q. B. 571; 1 Mor. 50.

<sup>3</sup> (1903), A. C. 220.

<sup>4</sup> *In re Fiddian Squire & Co.* (1892), 9 Mor. 95; contrast *Ex parte Coates in re Skelton* (1877), 5 Ch. D. 979; where an adjudication had been made.



Section 84 is an immaterial one an affidavit may not be required<sup>5</sup>. Objection on this ground will not be allowed to be raised for the first time on appeal<sup>6</sup>.

See as to compliance with the rules on appeal, *Ex parte Spanish Corporation, re Victoria*<sup>7</sup>, *Ex parte Rosenthal, re Dickinson*<sup>8</sup>.

Where for the first time a substantial objection is taken to proceedings on appeal the appellant may be allowed his costs of appeal, but not those of the hearing below<sup>9</sup>.

Defects in  
bankruptcy  
notices.

The English practice with respect to procedure on bankruptcy notices or debtor's summonses is very strict, for errors in the sum claimed to be due and other matters are seldom considered as other than defects of substance<sup>10</sup>.

Notice in  
wrong  
gazette.

Where by inadvertence a notice had not been published in the Canada Gazette until after inspectors had been appointed and the assets sold, Holmsted, R., directed an advertisement to be published in the Canada Gazette giving notice of the receiving order and of all that had taken place subsequent thereto, and appointing a time for a further meeting to consider and confirm what had been done, and also appointing a further day for sending in claims if any<sup>11</sup>.

Wrong  
initials.

Where an authorized assignment was made under a name which included unauthorized initials, the court in Quebec has ordered the correction of the papers, as a formal defect<sup>12</sup>.

<sup>5</sup> *In re and ex parte Ritso* (1883), 22 Ch. D. 529; 52 L. J. Bank. 535. <sup>6</sup> S. C.

<sup>7</sup> (1894), 1 Q. B. 259; 63 L. J. Q. B. 161.

<sup>8</sup> (1882), 20 Ch. D. 315, 318, 319; 51 L. J. Ch. 736; *cf.* on compliance with directory rules, *In re and ex parte Whitnall* (1882), 20 Ch. D. 438; *In re and ex parte Yeatman*, *supra*; *In re and ex parte Davis* (1872), L. R. 7 Ch. 526; 41 L. J. Bank. 69.

<sup>9</sup> *In re O. C. S.* (1904), 2 K. B. 161; 73 L. J. K. B. 585; 11 Mans. 122.

<sup>10</sup> See *In re Collier ex parte Dan Rylands, Ltd.* (1891), 8 Mor. 80; *In re a Debtor* (1908), 2 K. B. 684, 688, 689, 690; *In re O. C. S.* (1904), *supra*; *In re Miller* (1893), 10 Mor. 183; *In re Wenham ex parte Battams* (1900), 2 Q. B. 698; 69 L. J. Q. B. 803; 7 Mans. 309; *In re Bates ex parte Lindsey* (1887), 4 Mor. 192; *In re and ex parte Johnson* (1883), 25 Ch. D. 112; 53 L. J. Ch. 309; *Ex parte Gibson in re Low* (1895), 1 Q. B. 734; 64 L. J. Q. B. 362; 2 Mans. 169.

<sup>11</sup> *In re Excelsior Dairy Machinery Limited* (1920), 19 O. W. N. 292; 1 C. B. R. 388, and see *In re White* (1920), 19 O. W. N. 26 (Orde, J.).

<sup>12</sup> *In re Paquette, Ltd.* (1921), 1 C. B. R. 445 (Delisle, R.).



85. For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorized in that behalf, a firm may act by any of its members, and a lunatic may act by his committee or curator or by the guardian or curator of his property.

Section 85

Who may act for corporations, firms and lunatics.

**Cross References Act:** Proceedings by or against a firm, 70(2); limited partnerships, 76.

**Cross References Rules:** Effect of R. O. against firm, 94; liability of limited partner, 95; affidavit by corporation, 32.

**Analogous Legislation:** English Acts, 1914, s. 149; (1883), s. 148.

Section 85 is given in the form in which it was enacted by section 48 of *The Bankruptcy Act Amendment Act, 1921*<sup>1</sup>. It is difficult to see why the words "incorporated company" should have been substituted for the word "corporation." "Corporation" is defined in section 2(a).

Under the English Act and under the previous section the authorization had to be under the seal of the company<sup>2</sup>.

A company may grant a general authority to an officer to present petitions and take proceedings *in futuro* in respect of acts of bankruptcy which may not have arisen at the time when the authority was given,<sup>3</sup> for this section is to be given a liberal construction<sup>4</sup>; but if the authority given contemplates only the presentation of a petition on a then existing state of facts it will not be authority under which the officer can pre-

<sup>1</sup> The previous section read: 85. For all or any of the purposes of this Act, a corporation may act by any of its officers authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or by the guardian or curator of his property.

<sup>2</sup> Under that Act it was held that the resolution of the Board of Directors delegating its authority to the "officer" in question need not be under seal; provided the seal is affixed to the authority: *In re Midgley* (1913), 108 L. T. 45. See as to when a clerk might be an "officer" under the English Act, *In re Tompkins & Co.* (1901), 1 K. B. 476; 70 L. J. K. B. 223; 8 Mans. 132.

<sup>3</sup> *In re a Debtor* (No. 28 of 1917) (1917), 2 K. B. 808; (1917), H. B. R. 235. The form used is set out in the report of this case.

<sup>4</sup> *Per* McCardie, J., *In re a Debtor* (1917), 2 K. B. 808.



**Section 86** sent a petition founded on a subsequent act of bankruptcy<sup>5</sup>.

In any affidavit which is required to be filed it should, it is submitted, be stated that the deponent is duly authorized to take the proceedings in question<sup>6</sup>. The provisions of this section should be strictly complied with<sup>7</sup>.

Power of directors to assign property of company.

An assignment by the directors of an insolvent company of all the estate and property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require the formal assent of the whole body of shareholders<sup>8</sup>.

Power of partner to make assignment on behalf of firm.

At common law one partner can neither during the existence of the partnership nor after its dissolution, make an assignment of all the property and effects of the firm to a trustee for the benefit of creditors<sup>10</sup>.

Unincorporated companies.

As to the practice in England in the case of unincorporated companies which may sue or be sued in the name of a public officer or agent. See English Rule 277<sup>1</sup>.

Committee and curator.

Where a committee of a lunatic has been appointed in one province, it would seem that a guardian or curator subsequently appointed in another province has no *locus standi* to intervene in the assignment proceedings commenced by the committee in the name and on behalf of the lunatic<sup>2</sup>.

Certain provisions to bind Crown.

86. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme

<sup>5</sup> *In re a Debtor* (1915), 1 K. B. 287; 84 L. J. K. B. 254; 1 H. B. R. 18.

<sup>6</sup> See *In re and ex parte Torkington* (1874), L. R. 9 Ch. 298; *In re and ex parte Lowenthal* (1874), L. R. 9 Ch. 324; 43 L. J. Bank. 83.

<sup>7</sup> *In re Hodges* (1873), L. R. 8 Ch. 204; 42 L. J. Bank. 56.

<sup>8</sup> *Whiting v. Hovey* (1887), 14 S. C. R. 515, especially *per* Gwynne, J., at 531-4.

<sup>10</sup> *Cameron v. Stevenson* (1862), 12 U. C. C. P. 389; and *per* Spragge, V.C., in *Stevenson v. Brown* (1863), 9 U. C. L. J., O. S., 110.

<sup>1</sup> And see *In re Collier ex parte Dan Rylands, Ltd.* (1891), 8 Mor. 80; 64 L. T. 742; *In re Tovey* (1910), 26 T. L. R. 456; and see *The Bankruptcy Act*, s. 76.

<sup>2</sup> See *In re R. S. A.* (1901), 2 K. B. 32; 70 L. J. K. B. 475; 8 Mans. 164.



of arrangement, and the effect of a discharge, shall bind the Crown. Section 86

**Cross References Act:** Exception in favor of the Crown, 61(1); remedies against the property of a debtor, 6(1), 7, 11(1)(3)(10); 13(12)(19); 61(1)(2)(3)(4); 52(5); priorities of debts, 11(1)(3)(10); 13(16), 51, 52; the effect of a composition or scheme of arrangement, 13(12)(19); the effect of a discharge, 61.

**Analogous Legislation:** English Acts, 1914, s. 151; 1883, s. 150.

There is no provision similar to this in *The Winding-up Act*. The section does not say that the effect of an extension shall bind the Crown.

The general rule with respect to the Crown as given in Bacon's *Abridgment*<sup>3</sup> is "that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him"<sup>4</sup>. The rule is one of universal application and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community<sup>5</sup>.

Were there no legislation such as section 88, the Crown as a simple contract creditor in right of the Dominion<sup>6</sup>, or of the Province<sup>7</sup>, as the case might be, would be entitled to payment in priority over other creditors of equal degree<sup>8</sup> in spite of the provisions of

<sup>3</sup> 7th ed., p. 462.

<sup>4</sup> In view of the strictness with which the statutes purporting to limit the rights of the Crown are read it may be doubted whether this section binds the Crown in the right of the province, and see *The Interpretation Act*, R. S. C. 1906, c. 1, s. 16.

<sup>5</sup> *Commissioners of Taxation for N. S. W. v. Palmer* (1907), A. C. 179; 76 L. J. P. C. 41; 14 Mans. 106.

<sup>6</sup> *The Queen v. The Bank of Nova Scotia* (1885), 11 S. C. R. 1.

<sup>7</sup> *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892), A. C. 437, affirming (1888), 17 S. C. R. 657.

<sup>8</sup> S. C. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition the Crown's right prevails; and this is so whether the debt is of record or of specialty or of simple contract. See *per James, L.J., In re Henley & Co.* (1878), 9 Ch. D. 469, at 481.



**Section 87** section 51(4), which directs that, subject to the provisions of the Act, all debts proved in the bankruptcy or under the assignment shall be paid *pari passu*<sup>9</sup> for the prerogative of the Crown, where it has not been limited by local law<sup>10</sup> or statute, is as extensive in Canada as in Great Britain<sup>1</sup>.

Effect of section on rights of Crown as lessor.

It is probable that the provisions of section 52(5), respecting the disclaimer of leases, bind the Crown<sup>2</sup> for the whole group of sections which deal with the taking of the property out of the bankrupt and vesting it in the trustee are to be looked at as one homogeneous whole, and treated as provisions relating to remedies against the property of a debtor<sup>3</sup>.

Barristers, advocates and counsel.

87 (1) All persons who are barristers, solicitors or advocates of any court in any province may practise as barristers, solicitors and advocates in the courts exercising bankruptcy jurisdiction under this Act in any or in all of the provinces.

To be officers of the court.

(2) All persons who may practise as barristers, solicitors or advocates in the courts exercising bankruptcy jurisdiction under this Act shall be officers of such courts.

**Cross References Act:** Courts of Bankruptcy and Appeal Courts of Bankruptcy, 63.

Advocates and barristers of one province who take cases in Bankruptcy in another province will require to be familiar with those differences in local law which are a feature of Bankruptcy jurisprudence in Canada.

<sup>9</sup> *Commissioners of Taxation for N. S. W. v. Palmer* (1907), A. C. 179; 76 L. J. P. C. 41; 14 Mans. 106. As to the "collection" of taxes see s. 51(6).

<sup>10</sup> The prerogative of the Crown in right of the province may be limited or defined by provincial law such as the two Codes of Lower Canada: *Exchange Bank of Canada v. The Queen* (1886), 11 A. C. 157; and see *per Gwynne, dis.*, in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, *supra*.

<sup>1</sup> *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* *supra*; *The Queen v. Bank of Nova Scotia*, *supra*.

<sup>2</sup> See *In re Thomas ex parte Commissioners of Woods and Forests* (1888), 21 Q. B. D. 380; 57 L. J. Q. B. 574; 5 Mor. 209.

<sup>3</sup> *Per Willes, J.*, in *re Thomas ex parte Commissioners of Woods and Forests*, *supra*.



Persons who are officers of the Courts of Bankruptcy are subject to the disciplinary powers of those courts. Sections 88, 88a

88. Nothing in the provisions of this Act shall interfere with, or restrict the rights and privileges conferred on banks and banking corporations by *The Bank Act*. Rights of banks.

**Cross References Act:** Bank defined, 2(i).

The extent to which *The Bankruptcy Act* applies to banks may be determined by the definitions given to the words "debtor," "person" and "corporation." See sections 2(a), 2(aa), 2(k) and *The Interpretation Act*, R. S. C. 1906, c. 1, ss. 33, 34(20).

88A. Where by this Act any body of persons is given power or authority to permit, consent or approve, and the court is given like power or authority alternatively, or otherwise than on appeal, and such body of persons has been constituted or convened, the court shall not act except upon satisfactory proof of prior application to such body of persons and its refusal of such application or its omission to announce its conclusion thereon within what the court shall deem, according to the circumstances, a reasonable time. Where body of persons and court given alternative powers, court to await prior action.

**Cross References Act:** Inspectors, 43; permission of inspectors required by trustee, 20(1), 21; duty of inspectors when composition, 13(3)(b); trustee may apply to court for directions. 18(d); creditor may apply to court, 35.

This section was enacted by section 49 of *The Bankruptcy Act Amendment Act*, 1921. It appears to put the court in the position of an appellate body to the inspectors. See *In re North Eastern Insurance Co. Lim.* (1916), H. B. R. 154; 85 L. J. C. H. 751; *In re Consolidated Diesel Engine Mfrs.* (1915), 1 Ch. 192; 84 L. J. C. H. 325.



## PART VIII.

*Bankruptcy Offences.*

Section 89  
Bankruptcy  
offences.

89. Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made, or who has made an authorized assignment under this Act, shall in each of the cases following be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment.

Fraudulent  
debtors.

- (a) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud;
- (b) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;
- (c) If he does not deliver up to the trustee, or as he directs, all books, documents, papers and writing in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud;
- (d) If after the presentation of a bankruptcy petition against him or within six



months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals any part of his property to the value of fifty dollars or upwards or conceals any debt due to or from him, unless he proves that he had no intent to defraud; Section 89

- (e) If after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he fraudulently removes any part of his property to the value of fifty dollars or upwards;
- (f) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;
- (g) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or authorized assignment, he fails for the period of a month to inform the trustee thereof;
- (h) If, after the presentation of a bankruptcy petition against him or after he makes an authorized assignment, he prevents the production of any book, document, paper or writing, affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;
- (i) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation or



Section 89

falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

- (j) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;
- (k) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after the making of an authorized assignment by him or within six months next before the date of making thereof, he fraudulently parts with, alters or makes any omission in, or is privy to the fraudulently parting with, altering or making any omission in, any document affecting or relating to his property or affairs;
- (l) If, after the presentation of a bankruptcy petition against him or after the making of an authorized assignment by him or at any meeting of his creditors within six months next before such presentation or assignment, he attempts to account for any part of his property by fictitious losses or expenses;
- (m) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him, he, by any false representation or



- other fraud, has obtained any property on credit and has not paid for the same;
- (n) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him he obtains, under the false pretense of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud;
- (o) If within six months next before the presentation of a bankruptcy petition against him, or next before the date of the making of an authorized assignment by him or after the presentation of a bankruptcy petition against him or the making of an authorized assignment by him he pawns, pledges or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader such pawning, pledging or disposing is in the ordinary way of his trade and unless in any case he proves that he had no intent to defraud;
- (p) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy;
- (q) If he knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested, or for whom or for which he is acting, for the purpose of procuring in



## Section 89

any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan, or credit, the extension of a credit, the discount of any account receivable, or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft or promissory note, either for the benefit of himself or such person, firm or corporation;

(r) If he, knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested or for whom or for which he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in the preceding paragraph.

**Cross References Act:** Order of court for prosecution, 93; power of court to commit for trial, 95(1)(2); method of framing indictment, 95(3); only one trial, 95(4); discharge no bar to criminal proceedings, 94; other offences of debtor, 90, 91; property defined, 2(dd); property divisible among creditors, 25; statement of affairs, 54(1); false claim by creditor, 92; failure to keep proper books, 91; six months in, 89(i)(j)(k); to be read two years in certain cases, 91(3); presentation of petition, 4(1)(4); making of A. A., 9; proof of the making of a receiving order and of facts stated in notices, 77(3)(4).

**Cross References Rules:** Presentation of petition, 76.

**Analogous Legislation:** To ss. 89(a) to (p) English Act, 1914, ss. 154(1) to (16).

To s. 89(q), *Criminal Code*, 1906, s. 407a, as enacted by 1913, c. 13, s. 16.

To ss. 89(d)(e), *Criminal Code*, 1906, c. 146, s. 417(a).

To ss. 89(i)(j)(k)(l), *Criminal Code* (1906), c. 146, ss. 413, 415, 418; *Winding Up Act*, 1906, c. 144, s. 139.

To ss. 89(m)(n), *Criminal Code*, 1906, c. 146, s. 405, and s. 405a, as enacted by 1908, c. 18, s. 6.

Sec. 89(a).

The disclosure called for by 89(a) is not limited to property in the possession of the bankrupt at the time of the bankruptcy. It extends to dealings which have not been in the ordinary way of trade, *e.g.* fraudulent dealings which have occurred even five years before his bankruptcy\*. *Quære* whether there can be an

\* *R. v. Mitchell* (1880), 50 L. J. M. C. 76.



offence against section 89(a) before the conclusion of Section 89  
the examination of the bankruptcy<sup>9</sup>.

It is evidence that the debtor had no intent to Section 89  
defraud under section 89(a)(b)(d)(f) that at a pri- (a)(b)(d)(f).  
vate meeting of his creditors he disclosed all his pro-  
perty<sup>10</sup>. See under *The Insolvent Act* of 1875 on the  
question of the retention and concealment of property,  
*In re Russell*<sup>11</sup>.

*Semble* the words "any part of his property" in Sec. 89(e).  
section 89(e) include property which has been his,  
which remains in his possession, and the title to which  
so far as parted with at all has only been parted with  
in such a way as to leave it divisible amongst his credi-  
tors in the event of bankruptcy<sup>2</sup>.

Sections 89(m), 89(n) and 80(o) should be com- Sections  
pared with one another and with section 154(13)(14) 89(m)(n)(o).  
(15) of the English Act. It would seem that an offence  
can be committed under 89(m)(n) only in the period  
covered by the six months next before the presentation  
of the petition or the making of an authorized assign-  
ment; and that a debtor who by any false representa-  
tion or other fraud obtains property on credit after  
the presentation of the petition or the making of the  
authorized assignment cannot be convicted under sec-  
tion 89(m).

To satisfy the words of 89(m) there must be some Sec. 89(m).  
active fraud on the part of the bankrupt similar to the  
making of a false representation, not simply the pur-  
chase of goods when he knows that he is not able to pay  
for them<sup>3</sup>. False representation in 89(m) means  
fraudulent representation, that is to say a false repre-  
sentation knowing it to be false<sup>4</sup>.

<sup>9</sup>*R. v. Nash* (1864), 4 B. & S. 935.

<sup>10</sup>*R. v. Wiseman* (1902), 9 Mans. 12.

<sup>11</sup>(1882), 7 O. A. R. 777.

<sup>2</sup>*R. v. Humphries* (1904), 2 K. B. 89; explaining *R. v. Creese* (1874), L. R. 2 C. C. R. 105, where there had been an assignment to a trustee for the benefit of the debtor's creditors, the question being whether the property assigned was the property of the debtor or of the trustee.

<sup>3</sup>*Per Mellish, L.J., In ex parte Brett in re Hodgson* (1875), 1 Ch. D. 150; and see *per Adam Wilson J., In re Garratt* (1869), 28 U. C. Q. B. 266.

<sup>4</sup>*R. v. Cherry* (1871), 12 Cox C. C. 32.



## Section 90

Sec. 89(n).

In a prosecution under 89(m) it must be shown that the vendor parted with the goods on the faith of the false pretences<sup>5</sup>. *Semble* a broker may be guilty of an offence under 89(n) if he represents that he is buying for a principal when there is no principal<sup>6</sup>.

Section  
89(n)(o).

What is aimed at in section 89(n) (o) is the obtaining of goods on credit, and then immediately selling them at a loss; for that is not in the ordinary course of business<sup>7</sup>. These sections do not apply to a simple case of buying goods on credit for shipment abroad and raising money on the bills of lading; and the mode in which the money so raised was applied makes no difference<sup>8</sup>.

Sec. 89(o).

The giving of a bill of sale covering all his stock in trade to his sister for a past debt is not "pawning, pledging or disposing in the ordinary way of trade"<sup>9</sup>, and *semble*, such a transaction is an offence within the six months mentioned in section 89(o), even though the bill of sale was given in pursuance of a promise made outside that period<sup>10</sup>. *Semble*, the assigning of the whole of a trader's property to one creditor reserving nothing for the other shows an "intent to defraud" within section 89(o)<sup>1</sup>. It may be that if a debtor does not disclose to the trustee a transaction which is an offence under section 89(o) this will be evidence from which the jury may infer that the debtor had an intent to defraud when the transaction took place<sup>2</sup>.

Undischarged  
bankrupt  
obtaining  
credit.

90. Where an undischarged bankrupt or an undischarged authorized assignor,—

(a) either alone or jointly with any other person obtain credit to the extent of five hundred dollars or upwards from any person without informing that person that

<sup>5</sup> *Ex parte Stallard In re Howard* (1868), L. R. 3 Ch. 408, 409n.

<sup>6</sup> *R. v. Cherry, supra*.

<sup>7</sup> *Per Mellish, L.J., in Ex parte Brett in re Hodgson, supra*.

<sup>8</sup> *Per James, L.J., in Ex parte Brett in re Hodgson, supra*.

<sup>9</sup> *R. v. Thomas* (1870), 22 L. T. 138.

<sup>10</sup> *R. v. Thomas* (1870), *supra*.

<sup>1</sup> *R. v. Thomas, supra*.

<sup>2</sup> *R. v. Bolus* (1870), 23 L. T. 339.



he is an undischarged bankrupt or an undischarged authorized assignor; or, Section 90  
 (b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt or made such authorized assignment without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt or made such authorized assignment; Use of  
deceptive  
name.  
 he shall be guilty of an indictable offence and liable to a fine not exceeding five hundred dollars, or to a term not exceeding one year's imprisonment, or to both such fine and such imprisonment.

**Cross References Act:** Order by court for prosecution, 93; power of court to commit for trial, 95(1) (2); method of framing indictment, 95(3); only one trial, 95(4); discharge no bar to criminal proceedings. 94; fraudulently obtaining property on credit, 89(m).

**Analogous Legislation:** English Act, 1914, section 155.

The above gives section 90 as it was enacted by *The Bankruptcy Act Amendment Act 1920*<sup>3</sup>.

It is not necessary in order to bring a case within this section to show that there was an agreement to grant credit; there is an offence if payment should have been on delivery and the debtor "obtains credit" by accepting the goods and not paying cash<sup>4</sup>. "Obtains", it has been said, means getting the goods and retaining them and not paying for them<sup>5</sup>. Credit What is  
meant by  
"obtains  
credit."

<sup>3</sup> The previous section read:

90. Where an undischarged bankrupt or an undischarged authorized assignor,—

- (a) either alone or jointly with any other person obtains credit to the extent of fifty dollars or upwards from any person without informing that person that he is an undischarged bankrupt or an undischarged authorized assignor; or, Undischarged  
bankrupt  
obtaining  
credit.
- (b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt or made such authorized assignment without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt or made such authorized assignment; Use of  
deceptive  
name.

he shall be guilty of an indictable offence and liable to a fine not exceeding five hundred dollars and to a term not exceeding one year's imprisonment, or to both such fine and such imprisonment.

<sup>4</sup> *Reg. v. Peiers* (1886), 16 Q. B. D. 636; 55 L. J. M. C. 173.

<sup>5</sup> *Per Coleridge, C.J.*, in *Reg. v. Juby* (1887), 55 L. T. 788.



**Section 91** may have been obtained within the section even when security has been given for the debt, as where money is obtained on the faith of a security which is not of undoubted value<sup>6</sup>.

Five hundred dollars may be made up of several sums.

The offence of obtaining credit to the extent of five hundred dollars is complete when the undischarged bankrupt or assignor has obtained goods to such an amount as brings his credit to five hundred dollars, and this whether there has been only one order and shipment or several; for if the value of the last shipment when added to the unpaid balance on the previous shipments equals five hundred dollars credit has been obtained to that amount<sup>7</sup>.

Intent to defraud not necessary.

An intent to defraud is not an essential ingredient of the offence under this section<sup>8</sup>.

Where offence committed.

The offence is committed where the credit was obtained<sup>9</sup>, which may be at the place where the goods are bought<sup>10</sup>.

Obtaining goods by false pretences.

To obtain goods in exchange for a cheque, on a false representation that the cheque will be honoured on presentation is to obtain goods, and not credit by false pretences<sup>1</sup>.

Knowledge of creditor that debtor undischarged bankrupt.

It has been suggested that if the creditor knew the debtor was an undischarged bankrupt, though the debtor did not tell him so, there will be no conviction<sup>2</sup>.

Bankrupt failing to keep proper books of account.

91 (1). If any person who has on any previous occasion been adjudged bankrupt or made an authorized assignment or extension or arrangement with his creditors, is adjudged bankrupt, makes an authorized assignment or secures or asks for a composition, extension or arrangement with his creditors, he

<sup>6</sup> *R. v. Fryer* (1912), 7 Cr. A. C. 183.

<sup>7</sup> *Reg. v. Peters* (1886), 16 Q. B. D. 636; 55 L. J. M. C. 173; *Reg. v. Juby* (1887), 55 L. T. 788.

<sup>8</sup> *Reg. v. Dyson* (1894), 2 Q. B. 176; 63 L. J. M. C. 124; 1 Mans. 283.

<sup>9</sup> *Reg. v. Peters*, *supra*.

<sup>10</sup> *Reg. v. Dawson*, 59 L. T. 932.

<sup>1</sup> See *Rex v. Cosnett* (1901), 20 Cox C. C. 6; and see where money and not credit was obtained: *Rex. v. Coyne* (1905), 69 J. P. 151.

<sup>2</sup> See *In re Peel* (1903), 19 T. L. R. 207, at 208.



shall be guilty of an indictable offence and liable to a fine of one thousand dollars and to one year's imprisonment if, having, during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition or of the making of the authorized assignment or of the securing or asking for the composition, extension or arrangement, been engaged in any trade or business, he has not kept proper books of account throughout those two years or such part thereof, as aforesaid, and if so engaged at the date of presentation of the petition or the making of the assignment or the securing or asking for the composition, extension or arrangement, thereafter, whilst so engaged, up to the date of the receiving order, or the making of the assignment or the securing or asking for the composition, extension or arrangement, or has not preserved all books of account so kept: Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section if his unsecured liabilities at the date of the making of the receiving order, or the assignment or of the securing or asking for the composition, extension or arrangement did not exceed five hundred dollars or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.

Section 91

- (2) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received

Proper books  
of account  
defined.



## Section 91

Destruction,  
mutilation or  
fraudulent  
dealings with  
books.

and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

- (3) Paragraphs (i), (j) and (k) of section eighty-nine of this Act (which relate to the destruction, mutilation, and falsification and other fraudulent dealings with books and documents), shall, in their application to such books as aforesaid, have effect as if “two years next before the presentation of the bankruptcy petition” and “two years next before the date of the making of an authorized assignment” were substituted for the time mentioned in those paragraphs as the time prior to such presentation or making within which the acts or omissions specified in those paragraphs constitute an offence.

**Cross References Act:** Omission to keep usual and proper books of account, 59(b); order by court for prosecution, 93; power of court to commit for trial, 95(1)(2); method of framing indictment, 95(3); only one trial, 95(4); discharge no bar to criminal proceedings, 94; computation of time, 82.

**Cross References Rules:** Computation of time, 148-151.

**Analogous Legislation:** English Act, 1914, s. 158.

The word “composition” appears to have been omitted from the second and third lines of section 91(1). As to the date when the Act came into force and the question of retrospectivity, see notes to section 98. Section 91 has points in common with section 417(c) of the Criminal Code 1906, c. 146, which reads:

417. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

Being a  
trader fails  
to keep  
accounts.

(c) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full, and has not, for five years next before such inability, kept such books of account as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the court or judge and to show that the



absence of such books was not intended to defraud his creditors: **Section 93**  
 55-56 Vic. c. 29, s. 368; 4 Edw. VII. c. 7, s. 1.

- 
92. If any creditor, or any person claiming to be a creditor, in any bankruptcy proceedings, or in any proceedings pursuant to section thirteen of this Act, for obtaining a composition, extension or arrangement of a debtor's debts or of his affairs, or in any proceedings under an authorized assignment, wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account, which is untrue in any material particular, he shall be guilty of an indictable offence, and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year.

**Cross References Act:** Proof of debts, 45; proof by secured creditors, 46; failure of debtor to notify trustee of false claim, 89(g).

**Analogous Legislation:** English Act, 1914, s. 160.

- 
93. Where an authorized trustee reports to any court exercising jurisdiction under this Act that, in his opinion, a debtor in respect of whose estate a receiving order has been made or who has made an authorized assignment has been guilty of any offence under this Act, or where the court is satisfied, upon the representation of any creditor or inspector that there is ground to believe that the debtor has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, order that the debtor be prosecuted for such offence. Provided that it shall not be obligatory on the court, in the absence of any application by the trustee for such an order, to make an
- Order by court for prosecution on report of trustee.



## Section 93

order under this section for the prosecution of an offence unless it appears to the court that the circumstances are such as to render a prosecution desirable.

**Cross References Act:** Power of court to commit for trial, 95(1); liability of debtor after he has obtained his discharge or after approval of the composition, extension or Scheme of Arrangement, 94; offences of debtor under the Act, 89, 90, 91; *cf.* 54(6), 56(2); only one prosecution for an offence under the Act, 95(4).

**Analogous Legislation:** *English Bankruptcy Acts*, 1914, sections 161, 165; 1883, 164, 166; *The Debtor's Act*, 1869; 32 and 33 Vic. c. 62, ss. 16, 17, 18; *Dominion Winding Up Act*, R. S. C. 1906, c. 144, s. 138.

## ANALYSIS OF NOTES.

Order is obtained *ex parte*.

Appeal.

Principles on which court to act.

Form of order.

Order not condition precedent to prosecution but important for costs.

Action for malicious prosecution.

In case of composition, etc.

Order is  
obtained  
*ex parte*.

The order is an *ex parte* order<sup>3</sup> on application to the court having jurisdiction in bankruptcy in which the matter arises<sup>4</sup>. It may be given before the bankrupt has been examined<sup>5</sup>. Any representation to the court under this section by a creditor or inspector must be in writing, supported by proper evidence and filed with the proceedings<sup>6</sup>. The order may be made not only against the debtor but also against his accomplice and the trustee<sup>7</sup>, and the person against whom it

<sup>3</sup> *In re and ex parte Marsden* (1876), L. R. 2 Ch. 786; 45 L. J. Bank. 141. Under the *English Bankruptcy Act* of 1861 the procedure was different. The court exercised a judicial discretion in directing a prosecution, and the person accused was then entitled to be heard in opposition to it. Being so entitled he had a right to appeal and the consequence was that the prosecution could not proceed until the Court of Appeal had decided in favour of the prosecution. This was found to be a very inconvenient course and was altered by the Act of 1869. *Per Mellish, L.J., In ex parte Brown in re Appleby* (1876), L. R. 2 Ch. 799, 801.

<sup>4</sup> *Per James, L.J., In re and ex parte Dempsey* (1873), L. R. 8 Ch. 676, on the meaning of the words "any court."

<sup>5</sup> *In re and ex parte Levi* (1865), 34 L. J. Bank. 23.

<sup>6</sup> *In re and ex parte Leonard* (1874), L. R. 19 Eq. 269; 44 L. J. Bank. 80.

<sup>7</sup> *Ex parte Brown in re Appleby* (1876), L. R. 2 Ch. D. 789; 45 L. J. Bank. 115; *In re Orbell ex parte Evans* (1880), 43 L. T. 575; 44 L. T. 762.



has been made has no right to be heard against it; nor in England is he a "person aggrieved" who may appeal against it<sup>9</sup>. Section 93

But the order made may be appealed against by the trustee<sup>10</sup> or the creditor<sup>1</sup>, and in a proper case an order giving leave to prosecute *nunc pro tunc* may be substituted on appeal<sup>2</sup>. It may be reviewed, rescinded or varied<sup>3</sup>. Appeal.

A prosecution should not be directed on the ground of mere suspicion, but if there is reasonable evidence of the guilt of the debtor the court need not decide whether the evidence is likely to convince a jury<sup>4</sup>. The order may be made on the report of the trustee alone if the court is satisfied from it that there is reasonable probability of a conviction<sup>5</sup>. Where a debtor has committed an offence against section 89(e) by fraudulently removing his property, the fact that the trustee has recovered it is no reason for refusing to direct a prosecution<sup>6</sup>. If the trustee reports to the court that in his opinion the debtor has been guilty of an offence under the Act, the court should decide whether the debtor ought to be prosecuted; and this independently of whether the trustee asks for an order directing a prosecution or not<sup>7</sup>. Principles on which court to act.

<sup>9</sup> *In re and ex parte Marsden, supra; Ex parte Brown in re Appleby, supra*

<sup>10</sup> *In re and ex parte Marsden, supra; Ex parte Brown in re Appleby, supra; In re Orbell ex parte Evans, supra*; see, however, where the debtor had been served with notice of appeal by the trustee, *In re and ex parte Dempsey, supra*.

<sup>1</sup> *In re and ex parte Dempsey, supra; In re Dunn ex parte O. R. (1902)*, 1 K. B. 107; 71 L. J. K. B. 83; 9 Mans. 1; *Stephens ex parte The Trustee (1885)*, 2 Mor. 20.

<sup>2</sup> See *In re Burden ex parte Wood (1888)*, 21 Q. B. D. 24; 57 L. J. Q. B. 570; 5 Mor. 166.

<sup>3</sup> *Ex parte Priestly in re Stanlake & Son (1878)*, 10 Ch. D. 774; 48 L. J. Bank. 48.

<sup>4</sup> Per James, L.J., *In re and ex parte Dempsey (1873)*, L. R. 8 Ch. 676.

<sup>5</sup> *Ex parte Stallard in re Howard (1868)*, L. R. 3 Ch. 408; *Ex parte Strickland in re Still (1862)*, 32 L. J. Bank. 12.

<sup>6</sup> *In re and ex parte Marsden (1876)*, L. R. 2 Ch. 786; 45 L. J. Bank. 141.

<sup>7</sup> *Ex parte Monkhouse in re Ward (1879)*, 40 L. T. 296; and see *Stephens ex parte The Trustee (1885)*, 2 Mor. 20; *Ex parte Priestly in re Stanlake & Son, supra*.

<sup>8</sup> *In re Dunn ex parte O. R. (1902)*, 1 K. B. 107; 71 L. J. K. B. 83; 9 Mans. 1. The court need not determine the question at once, S. C. The trustee's report should be filed, S. C.



Section 94	<i>Semble</i> , the order may recite that there is reason for supposing that the bankrupt has been guilty of "some one or more" of the offences set out in section 89 without specifying the particular offences <sup>8</sup> . The order may direct the trustee to prosecute the debtor <sup>9</sup> .
Form of order.	
Order not condition precedent to prosecution but important for costs.	<i>Semble</i> , compliance with this section is not a condition precedent to a private prosecution <sup>10</sup> by a creditor or by the trustee, but if the trustee does not first apply for leave under the section he may be refused his costs out of the estate even though he has the permission of the inspectors to prosecute <sup>1</sup> . In England the expense of the prosecution, if one is directed, is borne by the country and not by the estate <sup>2</sup> .
Action for malicious prosecution.	An undischarged bankrupt has a right of action against his trustee in a proper case for malicious prosecution, even though he has sworn the information after an order made by the court under this section <sup>3</sup> .
In case of composition, etc.	This section probably may be invoked in proceedings under a composition, extension or scheme <sup>4</sup> .
Criminal liability after discharge or composition.	
	94. Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition, extension or scheme of arrangement has been accepted or approved.

<sup>8</sup> *In re and ex parte Levi* (1865), 34 L. J. Bank. 23.

<sup>9</sup> *In re and ex parte Dempsey* (1873), L. R. 8 Ch. 676.

<sup>10</sup> See *Ex parte Stallard in re Howard* (1868), L. R. 3 Ch. 408, but contrast *per Baggallay, J.A., In re and ex parte Marsden* (1876), L. R. 2 Ch. 786; 45 L. J. Bank. 141.

<sup>1</sup> *Ex parte White in re Howes* (1902), 2 K. B. 290; 71 L. J. K. B. 705; 9 Mans. 252. *Semble*, unless an order has been obtained under this section a taxing master should refuse to tax the trustee's costs for a prosecution, at least where the debtor has been acquitted, S. C. See where a *nunc pro tunc* order was made on appeal, the debtor having been convicted: *Ex parte Priestly in re Stanlake & Son* (1878), 10 Ch. D. 774; 48 L. J. Bank. 48.

<sup>2</sup> *In re and ex parte Marsden, supra*; *In re Orbell ex parte Evans* (1880), 43 L. T. 575; 44 L. T. 762; *Ex parte Strickland in re Still* (1862), 32 L. J. Bank. 12; *Ex parte Priestly in re Stanlake & Son, supra*; and see *English Bankruptcy Act, 1914*, s. 165.

<sup>3</sup> *Mittens v. Foreman* (1888), 58 L. J. Q. B. 40.

<sup>4</sup> See section 13(15) and *In re and ex parte Dempsey, supra*.



**Cross References Act:** Effect of discharge, 61; effect of composition, extension or scheme, 13(12); only one prosecution for each offence, 95(4); criminal offences under the Act, 89-92, 96. Section 95

**Analogous Legislation:** English Acts, 1914, s. 162 1883, s. 167.

Some of the mercantile offences which are crimes under the Criminal Code, R. S. C. 1906, c. 146, are Obtaining Goods by False Pretences, s. 405; Obtaining Credit by False Pretences, s. 405A, as enacted by 1908, c. 18, s. 6; Knowingly making a False Financial Statement in Writing with Intent that it be Relied on, s. 407A, as enacted by 1913, c. 13, s. 16; Destruction of, Mutilation of, or False entry in Books, 413, 415, 418; False Prospectus, s. 414; Fraudulent Conveyance or Disposition of Property, and not Keeping Proper Books, 417.

It was held in 1911, that is to say there was no Bankruptcy Act in force in Canada, that the section of the Criminal Code equivalent to section 417 of R. S. C. 1906, c. 145, was in effect bankruptcy law which made possible the extradition to the United States of a person guilty of an offence against *The Federal Bankruptcy Act* of that country<sup>b</sup>.

Where a debtor is convicted of an offence against *The Copyright Act*, and imprisoned in default of payment of the fine, he is not entitled to his discharge from prison on the execution, acceptance and approval of a composition, for the process on which he was arrested is of a criminal nature and not for a debt<sup>c</sup>.

95 (1) Where there is, in the opinion of the court, ground to believe that the bankrupt or any other person has been guilty of any offence under this Act, the court may commit the bankrupt or such other person for trial. Power for court to commit for trial.

(2) For the purpose of committing the bankrupt or such other person for trial, the Powers of court.

<sup>b</sup> *R. v. Stone* (1911), 17 Can. C. C. 249, 377; and see *United States v. Webber* (1912), 20 Can. C. C. 1, 6; *In re Goodman* (1916), 26 Can. C. C. 84, 254; 26 M. L. R. 537; 10 W. W. R. 781.

<sup>c</sup> *Ex parte Graves in re Prince* (1868), L. R. 3 Ch. 642.



### Section 95

Substance of  
offence  
charged in  
indictment.

Only one  
prosecution.

court shall have power to take depositions, bind over witnesses to appear, admit the accused to bail, or otherwise.

- (3) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant or document of, any court acting under this Act.
- (4) Where any person is prosecuted for an offence under this Act no other prosecution shall be instituted against him for the same offence under any other Act.

**Cross References Act:** Offences by bankrupt, 89-91; *cf.* 54(6), 56(2); offence of creditor, 92; *cf.* 54(2); of trustee, 11(14), 14(9); 96(b)(c); of other persons, 96(a); order for prosecution on report of trustee, creditor or inspector, 93.

**Analogous Legislation:** English Acts, 1914, ss. 163, 164(4); 1883, ss. 165.

Section 95(1)(2) is evidently designed to enable the court to commit the bankrupt or other person for trial without the necessity of a preliminary enquiry before a magistrate. The question arises whether this is legislation respecting the constitution of courts of criminal jurisdiction: or whether it does not rather concern procedure in criminal matters; whether it is ancillary bankruptcy legislation, or whether it can be supported under section 101 of *The British North America Act*<sup>1</sup>.

Power to act under section 95(1)(2) is given to the Bankruptcy Court only in respect of offences under *The Bankruptcy Act*. Bankruptcy and Mercantile offences under the Criminal Code are mentioned in the notes to section 94.

The provisions of s. 95(3) should be read with Part

<sup>1</sup> See *B. N. A. Act*, ss. 91(27), 92(14); 101; *In re Vancini* (1904), 34 S. C. R. 621; *Geller v. Loughrin* (1911), 24 O. L. R. 18; *In re Board of Commerce* (1920), 60 S. C. R. 456, 482-493.



XIX. of *The Criminal Code*, R. S. C. 1906, c. 146, Section 96  
*Procedure by Indictment*, particularly sections 852-858, 864-5, and with R. S. C. 1906, c. 1, s. 28, *The Interpretation Act*. What is meant by the last part of section 95(3) is that it is unnecessary in the indictment to set out the proceedings in bankruptcy<sup>s</sup>.

96. Any person, who,—

(a) not being an authorized trustee, advertises or represents himself to be such; or, Pretending to be trustee.

(b) being an authorized trustee, either before providing the bond required by section fourteen, subsection four, of this Act, or after providing the same but at any time while the said bond is not in force, acts as or exercises any of the powers of an authorized trustee; or, Trustee acting without bond.

(c) having been appointed an authorized trustee, with intent to defraud fails to observe or to perform any of the provisions of this Act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court, pursuant to any of the provisions of this Act; Non-compliance.

shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment, or to both such fine and such imprisonment.

**Cross References Act:** Appointment of trustees, 14; general security required from trustees, 14(4)-(7); additional security, 14(8); duties and powers of trustee, 17, *et seq.*; only one prosecution, 95(4); other offences of trustee, 11(14), 14(9).

<sup>s</sup> *Reg. v. Watkinson* (1872), 12 Cox C. C. 271; see further as to the practice under the corresponding English section: *Reg. v. Oliver* (1877), 13 Cox C. C. 588; 36 L. T. 114; *Reg. v. Knight* (1878), 14 Cox C. C. 31; 37 L. T. 801; *Reg. v. Pierce* (1887), 16 Cox C. C. 213; 56 L. J. M. C. 85; *Reg. v. Nash* (1864), 9 Cox C. C. 434; 33 L. J. M. C. 94; 9 B. & S. 935.



## Section 97

This section is as enacted by *The Bankruptcy Act Amendment Act 1920*.<sup>9</sup>

Penalty for removing, attempting or counselling removal of debtor's goods without notice.

97. Any person, except the authorized trustee hereinafter mentioned, who, before the elapse of fifteen days after delivery to the authorized trustee of the notice in writing mentioned in section twenty-two, subsection three, of this Act, or in case no such notice has been delivered, shall remove or attempt to remove the goods or any thereof mentioned in such section and subsection out of the charge or possession of the debtor or of the authorized trustee or other actual custodian of such goods, unless with the written permission of the trustee, shall be guilty of an indictable offence and liable to a fine not exceeding five thousand dollars, or to a term not exceeding two years' imprisonment, or to both such fine and such imprisonment.

This section was enacted by section 50 of *The Bankruptcy Act Amendment Act, 1921*. The original section 97 which dealt with malicious proceedings, was repealed by *The Bankruptcy Act Amendment Act, 1921*.<sup>1</sup>

<sup>9</sup> The previous section read :

96. Any person who,—

Pretending to be trustee. Trustee acting without bond.

- (a) not being an authorized trustee, advertises or represents himself to be such; or,
- (b) being an authorized trustee, either before providing the bond required by section fourteen, subsection four of this Act, or after providing the same, but at any time while the said bond is not in force, acts as or exercises any of the powers of an authorized trustee; or,

Non-compliance.

- (c) having been appointed an authorized trustee fails to observe or to perform any of the provisions of this Act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court, pursuant to any of the provisions of this Act;

shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment.

<sup>1</sup> That section read :

97. Any person who maliciously institutes or carries on against any person who has not done or suffered any act of bankruptcy any proceeding in bankruptcy under this Act shall be guilty of an indictable



98. Where any offence against this Act has been committed by an incorporated company every officer, director or agent of the company who directs, authorizes, condones, or participates in the commission of the offence, shall be liable to the like penalties as such company and as if he had committed the like offence personally, and he shall be so liable cumulatively with the company and with such officers, directors or agents of the company as may likewise be liable hereunder.

**Section 98**  
**Liability of**  
**officer,**  
**director or**  
**agent of**  
**Company.**

**Cross References Act:** Bankruptcy offences, 89; 90, 91, 92, 96.

Section 98 as it now stands and as given above was introduced by section 51 of *The Bankruptcy Act Amendment Act*, 1921. That section for some unexplained reason repealed the previous section 98, which read:—

98. This Act shall come into operation at a day to be named by proclamation of the Governor-in-Council.

The effect, if any, of this repeal on the operation of the Act and on sections 8(2) and 11(16) has yet to be determined.

The following notes and cross references refer to the original section 98.

**Cross References Act:** Certain acts which occurred before the coming into operation of the Act not available acts of Bankruptcy, 8(2)(a), provisions of 11(1)(10), applicable to certain judgments in Nova Scotia and New Brunswick registered prior to coming into operation of the Act, 11(16).

**Cross References Rules:** When rules come into operation, 1.

**Analogous Legislation:** English Act, 1914, s. 169.

The Act was brought into force July 1st, 1920<sup>10</sup>, by proclamation of the Governor-in-Council<sup>11</sup>, dated 31st December, 1919, published in *The Canada Gazette*, January 17th, 1920, Vol. 53, No. 29, p. 2172.

The general rule is that a statute had no retro-

offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years imprisonment, or to both such fine and such imprisonment.

<sup>10</sup> That is to say, the Act came into force on the expiration of June 30, 1920. See R. S. C. 1906, c. 1, s. 11.

<sup>11</sup> Governor-in-Council is defined R. S. C. 1906, c. 1, s. 37(7).



**Section 99** spective effect<sup>1</sup>. *Quære*, whether any assistance as to the intention of the legislature can be got from the fact that the operation of the statute is deferred to a future time<sup>2</sup>.

It seems probable that *The Bankruptcy Act* will not apply to acts and defaults of the debtor occurring prior to July 1, 1920, and no proceedings can be founded on them unless section 8 is read as giving an implied retrospective operation to the Act in cases not mentioned in that section<sup>3</sup>.

Section 9 of the Act purports to make null and void all assignments of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors. The fact that the Act contains no clause saving assignments commenced under Provincial Acts before the coming into operation of *The Bankruptcy Act* may perhaps cause no inconvenience if *The Bankruptcy Act* is held as not avoiding proceedings already commenced.

Administra-  
tion.

99. This Act shall be administered by the Minister of Justice.

<sup>1</sup> Craies (Harcastle) on Statute Law, 2nd edition, 1911, pp. 346-358. The question of the retrospectivity of various sections of different Bankruptcy Acts is discussed in the following cases: *In re Cohen ex parte O. R.* (1919), 2 K. B. 271; 88 L. J. K. B. 841; 3 H. B. R. 214; *In re Cullwick ex parte O. R.* (1918), 1 K. B. 646; 87 L. J. K. B. 827; 3 H. B. R. 33; *Shaw v. Allen* (1914), T. L. R. 631; *In re Athlumney ex parte Wilson* (1898), 2 Q. B. 547; 67 L. J. Q. B. 935; 5 Mans. 322; *In re Pulborough School Board Election, Bourke v. Nutt* (1894), 1 Q. B. 725; 63 L. J. Q. B. 497; 1 Mans. 172; *In re and ex parte Rogers* (1884), 13 Q. B. D. 438; 1 Mor. 159; *In re Jecks ex parte Bailey* (1871), L. R. 13 Eq. 314; 41 L. J. Bank. 1; *Reed v. Wiggins* (1862), 32 L. J. C. P. 131; 13 C. B. N. S. 220; *Marsh v. Higgins* (1850), 19 L. J. C. P. 297; 9 C. B. 551; *Luokin v. Simpson* (1840), 6 Bing. N. C. 353; *Terrington v. Hargreaves* (1829), 5 Bing. 489.

<sup>2</sup> *In re Athlumney ex parte Wilson* (1898), 2 Q. B. 547; and cases there cited, and see *per Mellor. J.*, in *Ellis v. McCormick* (1869), L. R. 4 Q. B. 271, 275. On the general question see *Schmidt v. Ritz* (1901), 31 S. C. R. 602; *Clarkson v. Sterling* (1888), 15 O. A. R. 234; *Mason v. Macdonald* (1880), 40 U. C. Q. B. 113; *cf. Yale v. Tollerton* (1866), 2 Ch. Ch. 49.

<sup>3</sup> See *In re and ex parte Pratt* (1884), 12 Q. B. D. 334. It was there held that proceedings under the Act of 1883 could be founded on an act of bankruptcy occurring prior to the coming into operation of the Act of 1883; for the words "if a debtor commits an act of bankruptcy" must be read "if at the time when the petition is presented the debtor shall have committed an act of bankruptcy"; and acts of bankruptcy existed under the Act of 1869. See as to offences committed before the Act came into force, *Lucas, Tanner and Co.* (1900), 32 O. R. 1.



# GENERAL RULES AND FORMS UNDER THE BANKRUPTCY ACT

P. C. No. 1398.

AT THE GOVERNMENT HOUSE AT OTTAWA,

THURSDAY, THE 30TH DAY OF JUNE, 1920.

*Present:*

HIS EXCELLENCY THE GOVERNOR IN COUNCIL.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, UNDER THE AUTHORITY OF THE BANKRUPTCY ACT, IS PLEASED TO ENACT AND PUT INTO FORCE THE ATTACHED GENERAL RULES AND FORMS, UNDER THE TITLE OF "GENERAL RULES AND FORMS UNDER THE BANKRUPTCY ACT," AND THE SAME ARE HEREBY ENACTED AND PUT INTO FORCE ACCORDINGLY.

RODOLPHE BOUDREAU,  
*Clerk of the Privy Council.*



## GENERAL RULES UNDER THE BANKRUPTCY ACT

### PART I.

#### PRELIMINARY.

<b>Rules 1, 2</b>	1. These Rules may be cited as "The Bankruptcy Rules,"
<b>Short title</b>	and shall come into operation on the First day of July, A.D. 1920. (E.R. 1.)*

The rules are made under the authority of section 66 of the Act. They were brought into force by P. C. 1398, dated June 30, 1920. See notes to section 98.

Inter-  
pretation of  
terms.

2. (1) In these Rules, unless the context or subject matter otherwise requires,—

"The Act" means "The Bankruptcy Act" and amendments thereto for the time being in force.

"The Court" means the Court as defined by The Bankruptcy Act and includes a Registrar when exercising the powers of the Court pursuant to the Act or these rules.

"Creditor" includes a corporation and a firm of creditors in partnership.

"Contributory" means a contributory as defined by section 36 (2) of the Act.

"Judge" means the Judge to whom bankruptcy business is for the time being assigned in any Court having jurisdiction under the Act, or any other judge having authority under the Act or these rules to act.

"Proper Officer" means the officer appointed by the Chief Justice of the Court for the transaction or disposal of the particular matter in question.

"Province" includes Territory.

"Registrar" means a registrar, deputy registrar or local registrar having jurisdiction in bankruptcy.

"Seal" shall mean the seal ordinarily used in civil actions and matters before it by the Court having jurisdiction, and the words "Sealed" or "and Sealed" where used shall refer to such seal.

"Taxing Officer" means and includes the officer of the Court whose duty it is to tax costs in bankruptcy proceedings or in

\* References to the corresponding English 1915 Rules have been inserted for the convenience of the profession.



pursuance of an authorized assignment or a composition, extension or scheme of arrangement. **Rules 3 to 6**

"Trustee" or "authorized trustee" means a Trustee or authorized trustee as defined by The Bankruptcy Act.

"Written," "writing" and any like expression shall include typewriting, printing or mimeographing or partly one and partly another.

(2) The definitions contained in section two of the Act shall, where applicable and unless the context or subject matter otherwise requires, apply to and be part of these rules. (E.R. 3.)

See definitions in section 2 of the Act.

3. (1) The forms in the Appendix, where applicable, or forms to the like effect with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct. **Use of forms in Appendix.**

(2) The provisions contained in the forms prescribed shall be deemed to be authorized by these rules. (E.R. 5.)

## PART II.

### GENERAL PROCEDURE.

4. All matters and applications shall be heard and determined in Chambers unless the Court or a judge shall in the particular matter or application otherwise direct. (Contrast E.R. 6.) **All matters heard in Chambers.**

5. A Registrar may without any general or special directions of the judge hear and determine any matter or application referred to in section 65(2) of the Act. (Cf. E.R. 7.) **Jurisdiction of Registrars.**

**Cross References:** Section 65, Rules 117, 119, 120, 11(1); 6.

By section 65(2)(e) the Registrar has power to make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in Chambers. It is suggested that the jurisdiction conferred by section 65(2)(e) and Rule 5 must be read subject to the limitations implied in section 65, and in the Rules. See section 65(2)(g), 65(3), and Rules 117, 119, 120, 11(1). As to *ex parte* applications see Rules 15, 2.

6. Any matter or application pending before a Registrar which under the Act, or the Bankruptcy Rules for the time being in force, a Registrar has jurisdiction to determine, shall be **Adjournment from Registrar to Judge.**



**Rules  
7 to 10**

adjourned to be heard before the Judge, if the Judge shall, either specially or by any general direction applicable to the particular case, so direct. (E.R. 8.)

**Cross References:** Rules 4, 5.

See *Re Hooley* (1899), 80 L. T. 495; 6 Mans. 176, where an application for a discharge was adjourned to be heard before the Judge.

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PROCEEDINGS.

Proceedings  
how  
intituled.  
See form 1.

7. Every proceeding in Court under the Act shall be dated, and shall be intituled in the name of the Court in which it is taken "In Bankruptcy," and then in the matter to which it relates. Numbers and dates may be denoted by figures. (E.R. 10.)

(2) Unless otherwise provided, all proceedings and documents required, under the Act or these Rules, to be filed in Court or with the proper officer, shall be filed with the registrar.

**Cross References:** Section 68. Rules 9, 18, 19, 76.

Written  
proceedings.

8. All proceedings in Court shall be written on sheets of paper of the size ordinarily used in civil actions or matters before it by the Court; but no objection shall be allowed to any proof, affidavit or other proceedings on account of its being written or printed on paper of other size. (E.R. 11.)

**Cross References:** Rule 2.

Records of  
Court.

9. All proceedings of the Court shall remain of record in the Court, but they may at all reasonable times be inspected by any person. (E.R. 12.)

**Cross References:** Rules 7(2); 76.

Depositions taken under section 56 are a "proceeding" and are to be placed on the file of proceedings *In re and ex parte Beall* (1894), 2 Q. B. 135; 63 L. J. Q. B. 425; 1 Mans. 203. See as to the practice under the Companies' Act *In re Standard Gold Mining Co.* (1895), 2 Ch. 545; 64 L. J. Ch. 790; 2 Mans. 463. Under the English Act an application to disclaim leaseholds is a "proceeding under the Act" *In re Proctor* (1891), 2 Q. B. 433; 8 Mor. 251. See further as to "proceedings under the Act," notes to sections 67, 68.

Process to  
be sealed.

10. All petitions, and warrants and subpoenas issued by the Court, shall be sealed. (E.R. 14.)

**Cross References:** Sections 4, 55, 56. Rules 34-49, 74-84. Forms 2, 58-61, 83-84.



11. (1) The judge may at any time, for good cause shown, order the proceedings in any matter under the Act to be transferred to the Court in another bankruptcy district or division. (E.R. 18.)
- (2) Where the proceedings in any matter are transferred to the Court in another bankruptcy district or division the proper officer of the first Court shall send by post the records of proceedings transferred, to the Registrar of the Court in the bankruptcy district or division to which the transfer is made and shall include with such records a copy of the order of transfer. (E.R. 22.)

Rules  
11 to 14

Transfer of  
proceedings.

See form 16.

Transmis-  
sion of  
records.

**Cross References:** Section 4(11) ; 71. Rules 12 ; 4, 5, 120.

It was held under the English practice that such an application should be made to the Judge in Chambers and not in Court: *In re Williams ex parte O. R.* (1888), 5 Mor. 103.

12. When any bankruptcy proceeding has been commenced in a bankruptcy district or division in which it should not have been commenced, the Judge of the Court of such bankruptcy district or division may order that the proceeding shall be transferred to the Court in the bankruptcy district or division in which the same should have been commenced, or that it be continued in the Court in which it was commenced; but, unless and until a transfer is made under these Rules, the proceeding shall continue in the Court in which it was commenced. (E.R. 24.)

Proceedings  
commenced  
in wrong  
Court.

**Cross References:** Sections 4(4) (11) ; 71. Rule 11.

13. Where any proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorized assignment, the Court may, on the application of the trustee or any creditor or shareholder, grant leave that all further proceedings in the winding up of the corporation or liquidation of its assets be continued under *The Winding-up Act* and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall seem best.

Leave to  
proceed  
under  
Winding-up  
Act.

**Cross References:** Sections 2(k) (o) ; 66(2). Rule 82.

#### MOTIONS AND PRACTICE.

14. Every application (unless otherwise provided by these Rules, or the Court shall in any particular case otherwise direct) shall be made by motion. (E.R. 26.)

Application  
to be made  
by motion.

**Cross References:** Rules 15, 16, 17, 18, 19.



**Rules  
15 to 17**

Provisions of other Acts requiring notice before action are inapplicable to proceedings by motion in the Court of Bankruptcy: *In re Lock ex parte Poppleton* (1890), 7 Mor. 184. A person may be estopped from moving in the Court of Bankruptcy by reason of the fact that he has failed in substantially the same matter elsewhere: *In re Hilton ex parte March* (1892), 67 L. T. 594; 9 Mor. 286. See as to the right of a sheriff to interplead by motion: *In re Morris ex parte Streeter* (1881), 19 Ch. D. 216; 45 L. T. 734.

**Notice of  
motion and  
Ex parte  
application.**

**15.** Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party duly shown to the Court, or upon proof to the satisfaction of the Court that notice of the intended motion has been duly served upon such party; provided that the Court, if satisfied that the delay caused by serving notice would or might entail serious mischief, may make any order *ex parte* upon such terms as to cost and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside. (E.R. 27.)

**Cross References:** Section 65 (2) (g).

Where the trustee moved for a declaration that certain property alleged to have been transferred by the debtor to the respondents was part of the debtor's estate it was held that a third party to whom the respondents had purported to sell the property had no *locus standi* to be heard, as process could not issue on the order which would bind the third party in any way: *In re Von Weissenfeld ex parte Hendry* (1892), 9 Mor. 30.

**Length of  
notice.**

**16.** Unless the Court gives leave to the contrary, notice of motion shall be served on any party to be affected thereby not less than four days before the day named in the notice for hearing the motion. An application for leave to serve short notice of motion may be made *ex parte*. (E.R. 28.)

**Cross References:** Section 83. Rules 149; 17, 50, 51, 52, 58.

The Court may, it seems, give leave to effect service by registered post or by service upon the solicitor representing the persons whom it is desired to serve: *In re and ex parte Calvert* (No. 2) (1899), 6 Mans. 216; 80 L. T. 499. Copies of the affidavit to be used on the motion should be served when the notice of motion is served: *In re Wells ex parte Collins* (1892), 9 Mor. 191; 66 L. T. 688. See as to service of a notice of motion on persons outside the jurisdiction of the English Court: *In re Rathbone ex parte Paterson* (1887), 56 L. J. Q. B. 504; 4 Mor. 270; 57 L. T. 420; 35 W. R. 735; *In re Alderson ex parte Kirby* (No. 2) (1891), 8 Mor. 95. See where the wrong date was mentioned in the notice: *In re Alderson ex parte Kirby* (No. 1) (1891), 8 Mor. 93.

**Personal  
service.**

**17.** In cases in which personal service of any notice of motion, order, or other proceeding, is required the same may be



effected by delivering to each party to be served a copy of the notice of motion, order, or other proceeding, as the case may be. (Cf. E.R. 32.)

Rules  
18 to 22

**Cross References:** Section 83. Rules 16, 35, 50-52, 77, 78, 80-84, 90, 91, 93.

Where personal service is not required service may be effected by registered post, sec. 83, Rule 52; and in the case of a solicitor but not of an authorized trustee, by being left at his address for service, Rule 51. See as to substituted service on the debtor 78, 80-84.

18. Every affidavit to be used in supporting or opposing any motion or application shall be filed with the proper officer not later than the day before the day of the hearing. (E.R. 33.)

19. A party intending to move shall, not later than the day before the day of the hearing, file with the proper officer a copy of his notice of motion. (E.R. 35.)

#### SETTLEMENT OF ORDER.

20. All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors. (Cf. E.R. 37.)

Settlement  
and signa-  
ture of  
orders.

#### SECURITY IN COURT.

21. (1) Except where otherwise provided any security required to be given shall be by bond of a guarantee company or corporation approved by the Court.

Security by  
bond.

See form 10.

(2) Provided, however, that the Court may in its discretion permit the security to be given by bond with one or more sureties to the Registrar of the Court or to the person proposed to be secured and in such case the Court may require the sureties to make an affidavit of justification and may also require such notice to be given to the person proposed to be secured as the Court deems advisable or expedient. (Cf. E.R. 38.)

Justification  
of sureties.

See forms  
11 and 12.

22. The bond shall be taken in a penal sum, which shall be not less than the sum for which security is to be given, and

Amount of  
bond.



- Rules 23 to 29** probable costs to be estimated by the Court, unless the opposite party consents to it being taken for a less sum. (E.R. 39.)
- Deposit in lieu of bond.** **23.** Where a person is required to give security he may, in lieu thereof, lodge in Court a sum equal to the sum in question in respect of which security is to be given and the probable costs to be estimated as aforesaid of the trial of the question, together with a memorandum to be approved of by the Registrar and to be signed by such person, his solicitor, or agent, setting forth the conditions on which the money is deposited. (E.R. 40.)
- Notice of deposit.** **24.** Where a person gives security by bond or makes a deposit of money in lieu of giving a bond, he shall forthwith before being entitled to proceed give notice in writing to the person to whom the security is to be given. (E.R. 46.)
- Payment of money into or out of Court.** **25.** Except as in the Act or these rules otherwise provided the Rules for the time being in force in civil actions or matters before it of the Court relating to payment into or out of Court of moneys shall apply to moneys lodged in Court or to be paid out of Court under these Rules. (E.R. 41.)

**Cross References:** Rules 22-25, 152. Forms 10, 11, 12.

#### AFFIDAVITS.

- Form of affidavits.** **26.** Every affidavit shall be drawn up in the first person, and shall state the description and true place of abode of its deponent, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any part of an affidavit containing unnecessary matters or which in the opinion of the taxing officer is unduly prolix. (E.R. 50, 51.)
- Scandalous matter.** **27.** The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client. (E.R. 53.)
- Erasures.** **28.** No affidavit having in the jurat or body thereof, any interlineation, alteration, or erasure shall, without leave of the Court, be read or made use of in any matter depending in Court unless the interlineation, alteration or erasure is authenticated by the initials of the officer or person taking the affidavit. (E.R. 54.)
- Blind or illiterate persons.** **29.** Where an affidavit is sworn by any person who appears to the person taking the affidavit to be illiterate or blind, the person taking the affidavit shall certify in the jurat that the



affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or declared his inability to sign in the presence of such person. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. (E.R. 55.)

**Rules  
30 to 34**

**30.** The Court may receive any affidavit sworn for the purpose of being used in any matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received. (E.R. 56.)

**Formal  
defects.**

**31.** No affidavit (other than a proof of debt) shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent, clerk or partner of such solicitor, or before the party himself. (E.R. 58.)

**Swearing of  
affidavits.**

**32.** Where by this Act or in these Rules it is provided that an affidavit or declaration be made by a debtor, authorized trustee or any other person and such debtor, authorized trustee, or other person is a corporation, such affidavit or declaration may be made by the manager or by any officer or employee of the corporation, who has knowledge of the facts deposed to providing that he states therein that he has such knowledge.

**Affidavit on  
behalf of  
corporation.**

**33.** The Court shall take judicial notice of the seal and/or signature of any person authorized by or under the Act or these rules to take affidavits or to certify to such authority. (E.R. 60.)

**Proof of  
affidavit.**

**Cross References:** Sections 79, 85, 87. Rules 146, 152, 34-42, 43, 50-52. Forms 3-5, 12, 35, 40, 43, 54, 55, 77.

#### WITNESSES AND DEPOSITIONS.

**34.** Any party to any proceeding in Court may by a writ of subpoena in the prescribed form, with or without a clause requiring the production of books, deeds, papers, documents and writings, require the attendance of a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the Court or any judge or registrar. The name of one or more witnesses may be inserted in the subpoena. (E.R. 61.)

**Attendance  
of witnesses.  
See forms  
83 and 84.**

**Cross References:** Rules 10, 35-42, 43, 48, 49, 50-52. Forms 84-85.

As to what may be "proceedings" see Rule 9. See as to whether the Court may issue a subpoena to a witness in an arbitration between the trustee and a third party. Section 63 and *In re Ackary ex parte*



**Rules  
35 to 38**

*Bolland* (1876), 3 Ch. D. 125; 45 L. J. Bank. 133. Rule 34 should be contrasted with the procedure laid down in section 56 with respect to the examination of debtors and others.

**Service of  
subpoena.**

**35.** A copy of the subpoena shall be served, personally, on the witness, within a reasonable time before the time of the return thereof, and service of the subpoena may, where required, be proved by affidavit. (E.R. 62, 63.)

**Cross References:** Rules 17, 34, 36-42, 26-33.

This rule requiring personal service of a copy of the subpoena does not apply to service of the appointment or summons under section 56: *In re Weinberg ex parte O. R.* (1907), 14 Mans. 277; 96 L. T. 79.

**Cost of  
witnesses.**

**36.** The costs of witnesses, whether they have been examined or not, may, in the discretion of the Court or taxing officer, be allowed; provided, however, that the Court may at any time limit the number of witnesses to be allowed on taxation of costs. (E.R. 64, 65.)

**Cross References:** Section 68(2). Rules 42, 54, 57, 102.

**Depositions,  
etc.**

**37.** The Court may, in any matter where it shall appear necessary for the purpose of justice, make an order for the examination upon oath before the Court or any officer, or other person, and at any place, of any witness or person, and may empower any party to any such matter to give such depositions in evidence therein on such terms (if any) as the Court may direct. (E.R. 66.)

**Cross References:** Section 56. Rule 34.

**Depositions  
may be  
taken in  
shorthand.****See form 63.**

**38.** (1) Where the evidence of any person is taken on or for use on the hearing of any motion, application or issue or in pursuance of an order for examination, commission or letters of request or where the debtor or any other person is examined under section 56 of the Act, or otherwise under the Act or these Rules, such evidence or examination may be taken in shorthand by a shorthand writer approved and duly sworn by the judge, registrar, or person before whom the examination is taken. A shorthand writer who has been duly appointed to report trials at sittings of the Court need not be sworn.

**Method of  
taking.**

(2) When taken in shorthand the evidence or examination may be taken down by question and answer; and unless otherwise ordered it shall not be necessary for the depositions to be read



over to or signed by the person examined, unless the judge or registrar so directs, when the examination is taken before a judge or registrar, or in other cases unless any of the parties so desire.

**Rules  
39 to 41**

(3) A copy of the depositions so taken, certified by the judge, registrar or person before whom the same were taken as correct, shall for all purposes have the same effect as the original depositions in ordinary cases. (*Cf.* E.R. 67, 68.)

**Cross References:** Section 56. Rules 34, 37, 39, 43, 131-134. Form 63.

**39.** An order for examination, commission or letters of request to examine witnesses, and the writ, order, commission or request, shall follow the forms for the time being in use in the Court in civil actions or matters before it with such variations as circumstances may require. (E.R. 69.)

**Cross References:** Rules 37, 39, 152.

**40.** The Court may, in any matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court may think fit to be produced. (E.R. 70.)

**Cross References:** Section 56. Rules 35, 145.

This rule may be invoked as an alternative to the powers given in section 56: *Re Geiger* (1913), 109 L. T. 224. Rule 69 of the Rules of 1883 corresponds with Rule 40.

This rule appears to be made for the purpose of carrying out the provisions of section 56(4)(5) of the Act, *per* Holmsted, R., in *Re Andrew Motherwell of Canada, Ltd.* (1921), 20 O. W. N. 306.

**41.** Any person wilfully disobeying any subpoena or order requiring his attendance for the purpose of being examined or producing any object, book or document shall be deemed guilty of contempt of Court, and may be dealt with accordingly. (E.R. 71.)

**Cross References:** Rules 34, 35, 37, 40, 48, 49.

*Semble*, a witness who has not been tendered the fees and conduct money referred to in Rule 42 cannot be committed for contempt under this rule: *In re Batson ex parte Hastie* (1894), 1 Mans. 45; 70 L. T. 382. The committal is by way of civil process, cannot be invoked against privilege of parliament, and determines *ex debito justitiae* as soon as the person committed yields obedience to the order of the Court and pays the costs: *In re Armstrong ex parte Lindsay* (1892), 1 Q. B. 327; 8 Mor. 271.



**Rules  
42 to 45**

**Conduct  
money.**

**42.** Any witness required to attend for the purpose of being examined, or to produce any document, or to give evidence, shall be entitled to the witness fees and conduct money provided by the tariff of costs in the appendix hereto. (E.R. 72.)

**Cross References:** Section 56. Rules 34, 35, 36, 37, 40, 41, 54, 102, 118. Tariff 89-91.

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DISCOVERY AND EXAMINATION.

**Discovery  
and  
examination.**

**43.** Any party to any proceeding in Court may, with leave of the Court, administer interrogatories to or obtain discovery of documents or examination for discovery from any other party to such proceeding, or any other person as authorized by the Court, and may also cross-examine any person upon an affidavit made by him in such a proceeding. Proceedings under this Rule shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to like matters in civil actions or matters in such Court. An application for leave under this Rule may be made *ex parte*. (E.R. 73.)

**Cross References:** Rule 152.

In England examination of the debtor is not allowed under the corresponding rule until after the receiving order is made: *In re Debtor* (1910), 2 K. B. 59. This Rule may not be made use of to do indirectly that which the process of the Court will not allow to be done directly: *In re Dashwood ex parte Kirk* (1886), 3 Mor. 257. The Rule applies in cases arising under section 56(4) (5) of the Act: *In re Andrew Motherwell of Canada, Ltd.* (1921), 20 O. W. N. 306 (Holmsted, R.).

See generally as to privilege on examination, notes to section 56. The Registrar in Manitoba refused an application for the examination of the debtor under Rule 43, where a criminal charge of fraudulently obtaining credit was pending against him: *In re Levine* (1921), 1 C. B. R. 410 (Patterson, R.). See as to Ontario practice in civil matters: *In re Ginsberg* (1917), 40 O. L. R. 136; 27 C. C. C. 447; *Mackell v. Ottawa Separate School Trustee* (1917), 40 O. L. R. 272.

As to "proceedings," see Rule 9.

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WARRANTS, ARRESTS AND COMMITMENTS.

**To whom  
warrants  
addressed.**

**See forms  
60 and 61.**

**Custody and  
production  
of debtor.**

**44.** A warrant of seizure, or a search warrant, or any other warrant issued under the provisions of the Act, or these rules, shall be addressed to the Sheriff or such other officer or person as the Court may in each case direct. (E.R. 80.)

**45.** When a debtor is arrested under a warrant issued under section fifty-five of the Act, he shall be given into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, who shall produce such debtor before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order; and any books, papers, moneys, goods, and chattels in the possession of the



debtor, which may be seized, shall forthwith be lodged with the trustee. (E.R. 81.)

**Rules  
46 to 49**

**46.** Where a person is apprehended under a warrant issued under section fifty-six (2) of the Act the officer apprehending him shall forthwith bring him before the Court issuing the warrant to the end that he may be examined, and if he cannot immediately be brought up for examination or examined, the officer shall deliver him into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, and the said Governor or Keeper shall receive him into custody and shall produce him before the Court as it may from time to time direct or order and subject to such direction or order shall safely keep him. (E.R. 82(1).)

**Execution  
of warrant.**

**47.** The officer executing a warrant issued under section fifty-six (2) of the Act shall forthwith, after apprehending the person named in the warrant and bringing him before the Court as in the last preceding rule mentioned, or after delivering him to the Governor or Keeper of the prison or gaol in the last preceding rule mentioned, as the case may be, report such apprehension or delivery to the Court issuing the warrant, and apply to the Court to appoint a day and time for the examination of the person so apprehended, and the Court shall thereupon appoint the earliest practicable day for the examination and shall issue its direction or order to the said Governor or Keeper to produce him for examination at a place and time to be mentioned in such direction or order. Notice of any such appointment shall forthwith be given by the Registrar to the Trustee and to such other person who shall have applied for the examination or warrant. (E.R. 82(2).)

**To be  
produced  
for examina-  
tion.**

**48.** Where an order of committal is made against any person, for disobeying any order of the Court, to do some particular act or thing, the Court may direct that the order of committal shall not be issued, provided that such person complies with the previous order within a specified time. (E.R. 85.)

**Suspension  
of order of  
committal.**

**49.** Where a debtor or witness refuses or neglects to attend at the time and place appointed for his examination or, if attending, refuses to be sworn, or to answer any lawful question, the rules of practice for the time being in force in similar or analogous proceedings in civil actions or matters before the Court shall in so far as the same are applicable, and not inconsistent with the Act or these Rules, apply.

**Where  
witness  
refuses to  
attend, etc.**

**Cross References:** Sections 55, 56 Rules 10, 50-52, 41, 152. Forms 60, 61.



**Rules  
50 to 54****SERVICE AND EXECUTION OF PROCESS.****Address of  
solicitor for  
service.**

**50.** Every solicitor suing out, filing or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business, which shall be called his address for service. All notices, orders, documents, and other written communications which do not require personal service shall be deemed to be sufficiently served on such solicitor if left for him at his address for service. (E.R. 87.)

**Hours of  
service.**

**51.** Service of notices, orders, or other proceedings shall be effected before the hour of five in the afternoon, except on Saturdays, when it shall be effected before the hour of one in the afternoon. Service effected after five in the afternoon on any week day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the next following day which is not a legal holiday. Service effected after one in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the next following day which is not a legal holiday. (E.R. 88.)

**Duties of  
sheriff or  
bailiff.**

**52.** It shall be the duty of the sheriff or bailiff of the Court having jurisdiction or such officer or officers as the Court may direct, to serve such orders, summonses, petitions and notices as the Court may require him to serve; to execute warrants and other process; and to do and perform all such things as may be required of him by the Court. Where any notice or other proceeding may be served by post it shall be sent by registered letter. (E.R. 89, 90.)

**Cross References:** Sections 87, 83. Rules 15-17, 34-35, 77, 78, 80-84, 90, 91, 148-151, 152.

It should be noted that section 50 providing for service other than by registered post where personal service is unnecessary applies only in the case of service on solicitors. It does not permit service on an authorized trustee by leaving the document at his office. In such case service must be by registered post if personal service cannot be effected.

**Enforce-  
ment of  
orders.**

**53.** Every order of the Court may be enforced as if it were a judgment of the Court. (E.R. 91.)

**COSTS AND TAXATION.****Awarding  
costs.**

**54.** (1) The Court in awarding costs may direct that the same shall be taxed and paid as between party and party or as between solicitor and client, or the Court may fix a sum to be paid in lieu of taxed costs.



(2) In the absence of any express direction costs of an opposed motion shall follow the event, and shall be taxed as between party and party. **Rules**  
**55, 56**

(3) Where an action is brought by or against an authorized trustee as representing the estate of the debtor, or where an authorized trustee is made a party to a cause or matter, on his application or on the application of any other party thereto, he shall not be personally liable for costs unless the judge before whom the action, cause or matter is tried for some special reason otherwise directs. (E.R. 96.)

**Cross References:** Sections 16(1), 68(2), 36(10), 37(9), 46(8), 56(3)(7), 4(7), 11(3), 51(1), 11(14); Rules 36, 42, 102, 118, 55-62.

If the direction referred to in 54(2) is not made at the time when the order awarding costs is made the Court has no jurisdiction to give it subsequently: *In re Angell ex parte Shoolbred* (1884), 14 Q. B. D. 298; 54 L. J. Q. B. 387; 2 Mor. 5. The scope of Rule 54(3) has yet to be determined. It is possible that it may be construed so as not to protect the trustee unless he sues or defends in his official name. See section 16(1). See as to liability of trustee for costs, notes to section 20(1)(c). See as to costs where the trustee resists payment of liability incurred by him subsequently to the assignment: *Re Auto Experts, Limited ex parte Tanner* (1921), 19 O. W. N. 532.

Where costs are given generally the subsequent costs of working out the order will be included: *Krehl v. Park* (1875), L. R. 10 Ch. 334; 44 L. J. Ch. 286; *In re Lavey* (No. 3) *ex parte Cohen & Cohen* (1920), B. & C. R. 182 (costs of a valuation of furniture where sale at a valuation was ordered).

**55.** (1) When a receiving order is made on a creditor's petition the costs of the petitioning creditor shall be taxed and be payable out of the estate. Costs of  
petition.

(2) When the proceeds of the estate are not sufficient for the payment of the petitioning creditor's costs and of any costs necessarily incurred by the trustee down to the conclusion of the first meeting of creditors, the Court may order such costs to be paid by the petitioning creditor. (E.R. 187.)

**Cross References:** Sections 4, 51, 15(3). Rules 54, 60, 61. See as to priority of costs under the Act of 1869, in the case of two petitions: *In re Springall ex parte Page* (1872), 25 L. T. 716. See as to costs of an unsuccessful petition under the then English rule: *In re a Debtor* (1910), 1 K. B. 313; 79 L. J. K. B. 263; 17 Mans. 6.

**56.** The costs directed by any order to be paid shall be taxed on production of a copy of such order, and the allocatur or certificate of taxation shall be signed and dated by the taxing master or officer and delivered to the person who presented such bill for taxation. Taxation  
of costs. (E.R. 98.)



**Rules  
57 to 60**Tariff of  
costs.See Part 2  
Appendix

**57.** (1) The tariff of costs set forth in the Appendix and the regulations contained in such tariff, shall, subject to these Rules, apply to the taxation and allowance of costs and charges in all proceedings.

(2) Where the estimated assets of the debtor, in accordance with the certificate of the authorized trustee, do not exceed the sum of fifteen hundred dollars, a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely—two thirds of the charges ordinarily allowed, disbursements being added, unless the Court by order directs that increased costs be allowed. (E.R. 103.)

**Cross References:** Section 67, 56(3). Rules 36, 54-56, 58-62, 102, 118. See notes to section 67: *In re Dowson ex parte Jaynes* (1888), 5 Mor. 240; 57 L. J. Q. B. 522; *In re Parfitt* (1889), 23 Q. B. D. 40; 58 L. J. Q. B. 428; 6 Mor. 166; *In re Weighell ex parte O. R.* (1909), 1 K. B. 92; 78 L. J. K. B. 86; 15 Mans. 335; *In re Marsh ex parte Board of Trade* (1894), 1 Mans. 486; 71 L. T. 776; *In re Proctor* (1891), 2 Q. B. 433; 8 Mor. 251.

Notice of  
appointment.

**58.** Every person whose bill or charges is or are to be taxed shall in all cases give not less than two days' notice of the appointment to tax the same to the Trustee, or to the opposite party or his solicitor, as the case may be. (E.R. 112.)

**Cross References:** Rule 16. Trustee means the trustee at the time when taxation takes place: *In re Smith ex parte Wilson* (1910), 2 K. B. 346; 80 L. J. K. B. 16; 17 Mans. 290.

Copy of  
bill.

**59.** Every person whose bill or charges is or are to be taxed shall on application of the trustee furnish to the trustee a copy of his bill or charges so to be taxed on payment at the rate of fifteen cents per folio, which payment may be charged to the estate. (E.R. 114.)

**Cross References:** Section 51.

Costs out of  
joint and  
separate  
estates.

**60.** Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred, the trustee may pay such costs and charges as cannot be paid out of the joint estate out of the separate estates of such co-debtors or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if such inspectors withhold or refuse their consent, then with the approval of the Court. (E.R. 121.)

**Cross References:** Sections 69, 28(2), 51(3). Rule 94.



61. Subject to the provisions of the Act, no costs shall be paid out of the estate or assets of the debtor, excepting the costs of the solicitor or solicitors employed by the trustee and such costs as have been awarded against the trustee or the estate of the debtor by order of the Court in any action or proceeding under the Act or these Rules.

**Rules  
61 to 65**

**Limit of  
costs pay-  
able by  
trustees.**

**Cross References:** Sections 51(1), 11(1)(3)(10)(14), 51(2), 67, 36(10), 37(9), 46(8), 56(3)(7), 4(7), 68(2), 74(4)(5). Rules 54, 62.

The principle on which bills of costs as between solicitor and client as distinguished from party and party, are to be taxed, is discussed in *Giles v. Randall* (1915), 1 K. B. 290; 84 L. J. K. B. 786. Taxation as between an authorized trustee and his solicitor falls within the second of the three classes mentioned in that case, that is to say where the costs are to be paid out of a common fund in which the client and others are interested. In such a case the taxing master has to say what is fair and proper: *In re Larey (No. 2) ex parte Cohen & Cohen* (1920), B. & C. R. 171.

#### FEES.

62. The fees to be charged for or in respect of proceedings under the Act shall be as fixed by the tariff in part three of the Appendix and shall be collected and may be retained by the registrars or other proper officers who perform the duties under the Act or these Rules in respect of which such fees are payable. In case of any proceedings not covered by the tariff a fee may be charged of an amount equal to the tariff fee for the proceeding most nearly resembling the one in question. In the case of any dispute as to the amount of fees charged the judge shall fix and settle the amount.

**Fees payable  
on pro-  
ceedings.**

**See part 3  
Appendix.**

#### RULES RELATING TO THE BUSINESS OF THE COURT.

63. The judge or judges of the Court appointed by the Minister of Justice to have jurisdiction in bankruptcy shall, with the approval of the Chief Justice of the Court, regulate the bankruptcy sittings and vacations of the Court. (E.R. 122.)

**Sittings.**

64. Any Registrar in bankruptcy may act for any other Registrar. (E.R. 124.)

**Registrars  
to act for  
each other.**

65. Writs of execution shall issue from the proper office of the Court and all proceedings thereon and in relation thereto shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to executions in civil actions or matters before such Court. (E.R. 126.)

**Execution  
on orders.**

**Cross Reference:** Rule 152.



**Rules  
66 to 68****Officers  
refusing to  
act.**

**66.** Where any registrar, clerk or other officer in bankruptcy refuses or neglects to act as such registrar, clerk or other officer or to perform or carry out any act, matter or thing connected with the office to which he has been appointed or assigned for the transaction or disposal of any matter in respect of which power or jurisdiction is given by "The Bankruptcy Act" or by these Rules, then, and in every such case, the registrar, clerk or other officer so neglecting or refusing, shall be guilty of contempt of court and be liable to be punished accordingly.

**Cross References:** Section 65(3). See as to jurisdiction over a registrar of a County Court: *In re Wise ex parte Registrar of Croydon County Court* (1886), 17 Q. B. D. 389; 55 L. J. Q. B. 362; 3 Mor. 174.

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**APPEALS FROM REGISTRAR.****Appeals  
from  
Registrar.**

**67.** An appeal from the registrar shall be by ordinary notice of motion to the judge of the bankruptcy district or division in which the proceedings are pending. No appeal shall be brought unless the notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of, or within such further time as may be allowed by the judge. The notice shall set forth fully the grounds of appeal. No security for the costs of the appeal need be given by the appellant.

**Cross References:** Section 65(4). Rule 14.

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**APPEALS TO APPEAL COURT.****Notice and  
time of  
appeal.**

**68.** No appeal from a judge to the Appeal Court shall be brought unless notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of or within such further time as may be allowed by a judge. (E.R. 130.)

**Security  
for appeal.**

(2) At or before the time of entering an appeal the party intending to appeal shall lodge in the court the sum of one hundred dollars to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Appeal Court may in any special case increase or diminish the amount of such security or dispense therewith. (E.R. 131.)

**Cross References:** Section 74. *Semble*, the notice must be given and the one hundred dollars also lodged within the time limited: *In re Taylor ex parte Bolton* (1909), 1 K. B. 103; 78 L. J. K. B. 102; 16 Mans. 19. As to applications to increase or diminish the amount after the deposit has been made, see *Ex parte Lovering in re Thorpe* (1873), 15 Eq. 291; 42 L. J. Bank. 39; *In re McHenry* (1886), 17 Q. B. D.



351; 55 L. J. Q. B. 496. See where there is no respondent: *In re Garrard* (1905), 92 L. T. 779; and when the appellant cannot raise the money: *In re Jones ex parte Lloyd* (1891), 64 L. T. 803; 8 Mor. 192; *In re Grepe* (1887), 4 Mor. 128; *In re Robertson* (1885), 2 Mor. 117. See under *The Winding-up Act* as to extending the time for appeal: *In re Calumet Metals, Ltd. v. Eldridge* (1914), 15 D. L. R. 461; and as to waiver: *In re the Oro Fino Mines, Ltd.* (1900), 7 B. C. R. 388; and see: *In re Florida*, 8 B. C. R. 388.

**Rules  
69 to 73**

69. The proper officer of the Court appealed from shall upon receiving a copy of the notice of appeal promptly transmit to the Registrar of the Appeal Court the notice of appeal and the file of proceedings in the matter under appeal. (E.R. 133.)

Transmission of proceedings.

70. Where an issue or question is, under the provisions of section seventy-one of the Act, tried by a Court other than the Court in which the bankruptcy proceedings are pending, any appeal from the decision of such Court shall be made to and be heard by the Appeal Court of the province in which the bankruptcy proceedings are pending.

Appeals when issued tried by another Court.

71. Subject to the foregoing Rules, appeals to the Appeal Court in any bankruptcy district or division shall be regulated by the Rules of such Court, for the time being in force in relation to appeals in civil actions or matters. (Cf. E.R. 134.)

Procedure on appeals.

**Cross References:** Rule 152. See as to order for substituted service of notice of appeal: *In re Whalley ex parte Warburg* (1883), 24 Ch. D. 364; 53 L. J. Ch. 336; and as to the right to a copy of the Registrar's notes, practice note in (1916), H. B. R. 166.

#### APPEALS TO SUPREME COURT.

72. An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

Time and notice of application.

(2) Where any security for the costs of such appeal is fixed the same shall be given to the Registrar in the manner and form prescribed by the rules and practice of the Supreme Court of Canada, or in manner and form to like effect.

Security.

**Cross References:** Section 74. Rule 73.

73. Subject to the foregoing rules appeals to the Supreme Court of Canada shall, as nearly as possible, be regulated by the rules of such Court for the time being in force in relation to appeals in civil matters or actions.

Procedure.



## PART III.

## PETITION IN BANKRUPTCY.

**Rules  
74 to 77****Form of  
petition.****See form 2.**

**74.** Every petition shall be fairly written and no alteration, interlineations, or erasures shall be made therein, after the same has been filed, without the leave of the Registrar. (E.R. 145.)

**Cross References:** Section 4. Rules 10, 75-84. Form 2. A petition may be signed for him by the petitioner's attorney: *In re and ex parte Wallace* (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 1 Mor. 246; and see *In re Hobbs* (1892), 66 L. T. 144.

**Security  
for costs.**

**75.** A petitioning creditor who is resident abroad, or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending under any such law, or who has made default in payment of any judgment, order for payment of money or of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor and proceedings under the petition may be stayed until such security is furnished. (E.R. 150.)

**Cross References:** Rules 21-25.

**Issue of  
petition.**

**76.** With every creditor's petition when filed there shall be lodged a copy to be sealed and issued to the petitioner. The petition shall be deemed to have been presented to the Court on the day of the filing thereof. (E.R. 151.)

**Cross References:** Sections 4(1) (4) (9), 7(1), 25. Rules 10, 74-75, 77-84, 85.

This rule is of considerable importance, for the relation back of the title of the trustee is to the date of the presentation of the petition. See notes to sections 4(10), 25. It is therefore to be regretted that the meaning of "shall be deemed to have been presented to the Court on the day of the filing thereof" is clouded by Rule 77. It is suggested that the words "presentation and hearing" in Rule 77 are to be read together, and do not refer to the presentation defined in Rule 76. See *In re and ex parte Davis* (1872), L. R. 7 Ch. 526; 41 L. J. Bank. 69. See further as to filing, Rules 7(2), 79, and *In re X.* (1920), 19 O. W. N. 12. If defective in form and substance the petition will not be filed: *In re X.*, *supra*. An authorized trustee may not file a petition for another person, for by so doing he is practising as a solicitor: *In re X.*, *supra*. As to presentation see Rule 85.

**Service of  
petition.****See form 2.**

**77.** A true copy of the creditor's petition, together with a notice of the time and place of the presentation and hearing thereof, shall be personally served upon the debtor at least eight days before the presentation and hearing; provided that where



it is proved to the satisfaction of the Court that the debtor has absconded, or in any other case for good cause shown, the Court may, on such terms, if any, as the Court may think fit to impose, hear the petition at such earlier date and without such service as the Court may deem expedient. (E.R. 155.)

**Rules  
78 to 80**

**Cross References:** Section 83. Rules 78, 80-84, 17, 50, 52, 74-76, 79, Form 2.

"Presentation and hearing" must be distinguished from the presentation which consists in filing under Rule 76. As to hearing the petition at an earlier date on consent, see *In re Thornton Davidson Co.* (1921), 1 C. B. R. 379 (Tellier, J.).

**78.** If the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid service of the petition or any other document, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition or such other document to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and such petition or other document shall then be deemed to have been duly served on the debtor. (E.R. 156.)

Substituted  
service.

See forms  
6 and 7.

**Cross References:** Section 83. Rules 80-84, 17, 50, 52, 74-77, 79-84. Forms 2, 6, 7. For decisions under the corresponding English rule the provisions of which are not quite the same, see *In re Lewis ex parte Becker* (1893), 10 Mor. 141; *In re Urquhart* (1890), 24 Q. B. D. 723; 59 L. J. Q. B. 364; 7 Mor. 94; *In re Studer ex parte Charteris* (1875), L. R. 10 Ch. 227; 44 L. J. Bank. 90; *In re Williams* (1873), L. R. 8 Ch. 690; *Ex parte O'Loghen* (1871), L. R. 6 Ch. 406; 40 L. J. Bank. 23.

**79.** Service of the petition may be proved by affidavit, with a sealed copy of the petition attached, and the same shall be filed in Court as soon as practicable after the service. (E.R. 157.)

Proof of  
service.

See form 5.

**Cross References:** Rule 76. Form 5.

**80.** Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place or one of the principal places of business of the firm in the province wherein the proceedings are taken, or if there is no such place then at the principal place of business of the firm in Canada, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there. (E.R. 279.)

Service on  
firm.



**Rules  
81 to 86**

Service on  
individual  
trading in  
name other  
than his own.

Service on  
corporation.

Service  
out of  
jurisdiction.

Death of  
debtor  
before  
service.

**81.** The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own. (E.R. 280.)

**82.** Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on a corporation if it is served at the head office or principal place, or one of the principal places of business of a corporation in the province wherein the proceedings are taken, or if there is no such place at the head office or principal place of business of the corporation in Canada, on the president, vice-president, secretary, treasurer, manager or upon any officer of the corporation or upon any person having at the time of service the control or management of the business of the corporation at the place of such service.

**83.** Where a debtor is not in Canada, the Court may order service of the petition or any other document to be made within such time and in such manner and form as it shall think fit. (E.R. 158, *cf.* 183.)

**84.** If a debtor against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representatives of the debtor, or on such other person as the Court may think fit. (E.R. 159.)

**Cross References:** Section 68(9). Rules 77, 78, 17, 50. A receiver or manager appointed by the Court to wind up a partnership business is not a "person having at the time of the service the control or management of the partnership business;" for he is not an agent of the partners, being responsible only to the Court: *In re Flowers & Co.* (1897), 1 Q. B. 14; 65 L. J. Q. B. 679; 3 Mans. 294.

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INTERIM RECEIVER.

Appointment  
of interim  
receiver.

See form 15.

**85.** After the presentation of a petition, upon the application of a creditor, or of an authorized trustee, or of the debtor himself, and upon proof by affidavit of sufficient grounds for the appointment of an authorized trustee as interim receiver of the property of the debtor or any part thereof, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment; such order may be made *ex parte*. (E.R. 160.)

Damages  
if petition  
dismissed.

**86.** Where, after an order has been made appointing an authorized trustee interim receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate, with respect to any damages or claim thereto arising out of the appointment;



including the proper remuneration of the trustee, and shall make such order as the Court thinks fit. (E.R. 165).

**Rules**  
**87 to 89**

**Cross References:** Section 5. Form 15.

#### HEARING OF PETITION.

87. Where a debtor intends to show cause against a petition he shall file a notice with the proper officer, specifying the statements in the petition which he intends to deny or dispute, and shall transmit by post to the solicitor of the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard. (E.R. 169.)

Debtor  
intending  
to show  
cause.  
  
See form 8.

**Cross References:** Section 4. Rules 88-91, 148, 150. Form 8.

Where no notice is given by the debtor under this Rule, the creditor should still be prepared to prove all essentials; though in such case the question of proof rests, to a certain extent, in the discretion of the Court: *In re and ex parte Sanders* (1894), 63 L. J. Q. B. 734; 1 Mans. 382; for the debtor may dispute the petition, even though no notice has been given: *In re and ex parte Dale* (1876), 3 Ch. D. 322; 45 L. J. Bank. 129; and even though a notice has been given and withdrawn: *In re Luttman ex parte Learoyd* (1880), 13 Ch. D. 321; 42 L. T. 162; provided the plea is not dilatory merely: *In re and ex parte Sanders, supra*.

88. If the debtor does not appear at the hearing, the Court may make a receiving order and adjudge the debtor bankrupt on such proof of the statements in the petition as the Court shall think sufficient. (E.R. 170.)

Non-  
appearance  
of debtor.

**Cross References:** Section 4. Rules 87, 89-91. Where the debtor does not appear, and the Court refuses to make a receiving order, notice of appeal must be served on the debtor: *In re Whalley ex parte Warburg* (1883), 24 Ch. D. 364; 53 L. J. Ch. 336. The affidavit required by section 4(2) is in order that the Registrar may seal the petition. Further proof should be given on the hearing: *In re and ex parte Lindsay* (1874), L. R. 19 Eq. 52; 44 L. J. Bank. 5. Proof should be given at the hearing that the petitioning creditor's debt is still a subsisting debt. This may be proved by *viva voce* evidence: *In re Stables ex parte Smith & Son* (1894), 1 Mans. 68.

89. On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved to the satisfaction of the Court by affidavit or by any evidence which would be admissible to prove the facts in a civil action in the Court. (E.R. 171.)

Appearance  
of debtor  
to show  
cause.

**Cross References:** Section 4. Rules 87-88, 90-91. Where the debtor gives notice of his intention to dispute the statements in the



**Rules  
90 to 92**

petition and attends at the hearing, but gives no evidence, the creditor must prove the statements in the petition: *In re Ormston ex parte Dodd* (1876), 3 Ch. D. 452; 25 W. R. 182.

**Proceedings  
after trial  
of disputed  
question.**

90. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, which question may be determined in such manner as the Court may direct, and such question has been decided in favour of the validity of the debt, the registrar shall, on production of the judgment of the Court, or a copy thereof, and on the application of the petitioning creditor, fix a day on which further proceedings on the petition may be had. The petitioning creditor shall within forty-eight hours of the date of said appointment mail or deliver to the debtor, at the address given in his notice of dispute, a notice in writing of such appointment, and a like notice to his solicitor, if known. (E.R. 174.)

**Application  
to dismiss.**

91. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt, the registrar shall on the production of the judgment of the Court or a copy thereof, and on application of the debtor, fix a day on which he may apply to the Court for the dismissal of the petition with costs. The debtor shall, within forty-eight hours of the date of the appointment, mail or deliver to the petitioner (and to his solicitor, if known) notice in writing of the time and place fixed for the hearing of the application. (E.R. 175.)

**Cross References:** Section 71(3). Rules 16, 17, 35, 50-52, 77, 78, 80-84, 87-89. Where the validity of the debt has been established by a Court of first instance, the Registrar has a judicial discretion to proceed with the hearing of the petition, and is not bound to wait for a final decision of the Court of Appeal on the validity of the debt; but if satisfied that a *bona fide* appeal is pending he ought to adjourn the hearing until the appeal is disposed of: *In re and ex parte Yeatman* (1880), 16 Ch. D. 283; 44 L. T. 260; 29 W. R. 457. Before fixing a day for the hearing, the Registrar should require the production of the judgment establishing the debt or of a copy thereof; but if this has not been done the irregularity will be waived by the appearance of the debtor or his solicitor on the day fixed without taking the objection, which cannot thereafter be raised: *In re and ex parte Yeatman, supra*.

**RECEIVING ORDER.****Contents.****See form 14.**

92. When a receiving order is made on a creditor's petition there shall be stated in the receiving order the nature and date, or dates, of the act, or acts, of bankruptcy upon which the order has been made. (E.R. 179.)



**93.** The Trustee shall cause a copy of the receiving order or of the order appointing the trustee an interim receiver, as the case may be, to be served on the debtor. (E.R. 182.)

**Rules  
93 to 97**

Service.

**94.** A receiving order against a firm shall operate as a receiving order not only against the firm, but also against each person who at the date of the order is a partner in that firm. (E.R. 285.)

Receiving  
order  
against firm.

**95.** The rights or liabilities of any past or present limited partner of a limited partnership, against which a receiving order has been made or which has made an authorized assignment, as such rights or liabilities are fixed or defined by the statutory provision (if any) of the province wherein the partnership business is or has been carried on, shall not in any way be prejudiced or affected by these Rules. (Cf. E.R. 286, 290.)

Liability  
of limited  
partners.

**96.** An application to the Court to rescind a receiving order or to stay proceedings thereunder, or to annul an adjudication, shall not be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon the trustee. Unless the Court gives leave to the contrary, notice of any such application together with copies of such affidavits shall be served on the trustee not less than four days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit. (E.R. 188.)

Applications  
to rescind  
receiving  
order, etc.

**Cross References:** Sections 3-6, 69, 76, 62, 68(10), 13(14) (18). Rules 17, 60, 149, 150. Form 14. See as to the effect of a receiving order against a firm: *In re Jameson ex parte Cresswell* (1891), 8 Mor. 278. Where one of the partners is an infant, a receiving order cannot be made against the firm simply, but may be made against the firm "other than" the infant partner: *Lovell v. Beauchamp* (1894), A. C. 607; 63 L. J. Q. B. 802; 1 Mans. 467.

#### STATEMENT OF AFFAIRS.

**97.** (1) Every debtor shall be furnished by the trustee with instructions for the preparation of his statement of affairs. Such statement of affairs shall be made out in duplicate and shall be verified by the debtor. The trustee shall file with the Registrar one of such verified statements. (E.R. 189.)

How made  
out.

See form 52.

(2) Where the debtor is a partnership it shall submit a statement, in duplicate, of its partnership affairs verified by one of the partners or by the manager in charge of the business and each partner shall submit a statement, in duplicate, of his separate affairs verified personally (E.R. 287.)

By firm.



**Rules  
98 to 102**  
By corpora-  
tion.

(3) Where the debtor is a corporation the statement of affairs, in duplicate, shall be verified by the president, vice-president, secretary, treasurer, general manager, manager or by any officer or director of the corporation having knowledge of the facts contained in such statement.

**Cross References:** Section 54. Form 52. The statement of affairs must be filed in proceedings relating to compositions, extensions and schemes, as well as in other cases: *In re Richardson* (1921), 1 C. B. R. 417; 19 O. W. N. 494 (Holmested, R.).

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#### COMPOSITION, EXTENSION OR SCHEME OF ARRANGEMENT.

Form of  
proposal.  
See forms  
23 and 24.

**98.** Where a debtor intends to submit a proposal for a composition, extension or scheme of arrangement the prescribed forms in the appendix, of proposal, notice and report shall be used by the trustee for the purpose of meetings of creditors for consideration of the proposal. (E.R. 200.)

Notice to  
creditors.  
See forms  
28 and 29.

**99.** Whenever an application is made to the Court to approve of a composition, extension or scheme, the trustee shall, not less than seven days before the hearing of the application, send notice by registered mail of the application to the debtor and to every creditor who has proved his debt; and the trustee shall file his report not less than two days before the time fixed for hearing the application. (E.R. 203, 205.)

Opposed  
application.

**100.** In any case in which an application is made to the Court to approve a composition, extension or scheme and the trustee reports to the Court any fact, matter, or circumstance which would justify the Court in refusing to approve of the composition, extension or scheme, such application shall be deemed to be an opposed application within the meaning of section 65(2) (d) of the Act. (E.R. 204.)

Hearing  
and appeal.

**101.** On the hearing of any application to the Court to approve of a composition, extension or scheme the Court shall in addition to considering the report of the trustee hear the trustee, the debtor and/or any opposing, objecting or assenting creditor thereon, and an appeal to the Court of Appeal shall lie at the instance of the trustee, the debtor or any such creditor from any order of the Court made upon such application. (E.R. 206.)

Costs of  
application.

**102.** No costs incurred by a debtor, of or incidental to an application to approve a composition, extension or scheme, other than the costs incurred by the trustee, shall be allowed out of the estate if the Court refuses to approve the composition, extension or scheme. (E.R. 207.)



**103.** The Court before making an order approving a composition, extension or scheme shall, in addition to investigating the other matters as required by the Act, require proof that the provisions of section 13(1) and (2) of the Act have been complied with. (E.R. 208.)

**Rules  
103 to 108**

**Evidence  
and order.**

**104.** At the time a composition, extension or scheme is approved, the Court may correct or supply any accidental or formal slip, error, or omission therein, but no alteration in the substance of the composition, extension or scheme shall be made. (E.R. 211.)

**Correction  
of formal  
slips.**

**105.** Where a composition, extension or scheme is annulled, the property of the debtor shall, unless the Court otherwise directs, forthwith re-vest in the trustee, if any, in whom the estate was originally vested without any special order being made or necessary. (E.R. 216.)

**Vesting of  
property  
when  
composition  
annulled.**

**106.** Every person claiming to be a creditor under any composition, extension or scheme, who has not proved his debt before the approval of such composition, extension or scheme, shall lodge his proof with the trustee thereunder, who shall admit or disallow the same. And no creditor shall be entitled to enforce payment of any part of the sums payable under a composition, extension or scheme unless and until he has proved his debt and his proof has been admitted or allowed (E.R. 219.)

**Proof of  
debts in  
composition,  
etc.**

**Cross References:** Sections 13, 65, 45, 53, 74. Rule 149. Forms 23-31.

#### DISCHARGE OF TRUSTEE.

**107.** The application of an authorized trustee for a grant of discharge (whether full or partial) shall be made in the prescribed form to the Registrar and shall be verified by the affidavit of such authorized trustee. Such application shall contain or have attached thereto a complete and itemized statement showing all moneys realized by such authorized trustee from and out of the property of the bankrupt or assignor and of all moneys disbursed and expenses incurred and the remuneration claimed by such authorized trustee; and full particulars, description and value of all property belonging to the estate which has not been sold or realized upon, setting out the reasons why such property has not been sold or realized upon; and full particulars and information with regard to any unsettled disputes, actions or proceedings between such authorized trustee and either the debtor or any creditor or creditors or any other person connected with the estate.

**Form of  
application.  
See forms  
42 and 43.**

**108.** The trustee shall, unless otherwise ordered by the Court on an *ex parte* application, at least ten days prior to the hearing

**Notice of  
application.**



**Rules  
109 to 111**

of the application send notice in writing by registered mail to the debtor and to each of the creditors.

Debtor or  
creditor  
opposing  
discharge.

**109.** (1) If the debtor or any creditor desires to oppose the application for discharge he shall file with the Registrar, at least two days prior to the hearing or within such further time as the Court may allow, a notice in writing of his intention to oppose the application setting out his reasons therefor and shall serve a copy of the said notice on the authorized trustee, within the time aforesaid.

Registrar  
may grant  
unopposed  
application.

(2) If the application for discharge is not opposed the Registrar may either grant or refuse the same. If the application is opposed the same shall be adjourned for hearing before a judge.

See forms.

Trustee to  
keep docu-  
ments  
securely.

**110.** The authorized trustee shall keep for a period of at least six years from the date of declaring a final dividend all current books of record and important documents of the estate of the bankrupt or authorized assignor. After the expiration of such period the trustee may destroy unimportant books and documents but shall continue to keep for a further period of fourteen years from the date thereof all title papers relating to real or immovable estate, important documents under seal and such other books and papers which in the judgment of the trustee should be kept. During the said periods the trustee shall at all times produce and dispose of all books and papers in his possession as ordered by the Court.

**Cross References:** Sections 41, 15, 17(1), 65. Rule 149. Forms 42, 43, 44. While section 41(1) provides for the discharge of the trustee from further performance of all or any of his duties with respect to the estate, neither that section nor the Rules makes any provision for the vesting in some other person of the property vested in the trustee. See where an adjudication is annulled, sections 62(2), 13(18). The debtor is entitled to any surplus remaining after discharge of his obligations, section 38.

Provisions  
in case of  
false bidding  
in Quebec.

**111.** In the case of the sale of immovable property in the Province of Quebec by the trustee, if the purchaser has not paid the whole of the purchase price or given security when he may lawfully do so under the provisions of the Code of Civil Procedure for the Province of Quebec, the trustee may obtain from the Court an order for the resale of the property; the purchaser may however prevent the resale for false bidding by paying to the trustee, before such resale, the amount of his bid with the interest accrued by reason of his default and all costs incurred thereby; if a resale takes place the false bidder is liable to the trustee for the difference between the amount of his bid and the price brought on the resale with all costs incurred by reason of his default for the payment of which on application of the



trustee, the Court may make an order against the false bidder; if the price obtained on the resale is greater, it goes to the benefit of the estate. **Rules**  
**112 to 115**

**Cross References:** Section 20(3) (b).

#### MEETING OF CREDITORS.

**112.** (1) Where a meeting of creditors is called by notice, the proceedings had and resolutions passed at such meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors shall not have received the notice sent to them and notwithstanding the inadvertent omission to send such notice to one or more creditors. (E.R. 243.) Non-reception of notice by creditor.

(2) Where a meeting of creditors is adjourned, the adjourned meeting shall be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified. (E.R. 248.) Adjournment.

**113.** A debtor who is required by a trustee to attend any meeting of creditors (other than the first meeting) and who resides at a distance of more than ten miles from the place of such meeting, shall be entitled to be paid for such attendance the like conduct money and expenses as if he were a witness required to attend in Court or for the purpose of being examined. Payment to debtor of expenses.

**114.** Every class of creditors shall express its views and wishes separately from every other class and the effect to be given to such views and wishes shall, in case of any dispute and subject to the provisions of the Act, be in the discretion of the Court having regard to the financial condition of the debtor. Disputes between creditors to be settled by Court.

**Cross References:** Sections 42, 77, 83, 84, 2(m). Rule 146. Forms 45, 46. Tariff 89-91. See as to quorum: *In re Thomas ex parte Warner* (1911), 55 Sol. J. 482.

#### PROOF OF CLAIMS.

**115.** In any case in which it shall appear from the debtor's statement of affairs that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or his foreman, or the book-keeper of the debtor, or some other person on behalf of all such creditors. Such proof shall have annexed thereto, as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others. (E.R. 251.) Workmen's wage claims.  
See form 48.



- Rules 116 to 119**  
**Notice of admission of proof.**
116. Where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission. (E.R. 261.)
- Cross References:** Sections 45, 46, 53, 37. Rule 117. Forms 47, 48.

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DISALLOWANCE OF CLAIMS.

- Form and service of notice.**  
**See form 51.**
117. The appeal of a claimant from the trustee's decision under section 53 of the Act shall be by notice of motion to a judge and the trustee shall be served with a copy thereof in the ordinary manner provided by these Rules. The judge shall hear and dispose of the appeal summarily on affidavits or *viva voce* evidence or both as to the judge shall seem best.
- Costs of appeal.**
118. The trustee shall in no case be personally liable for costs in relation to an appeal from his decision rejecting or disallowing any proof wholly or in part. (E.R. 263.)
- Cross References:** Sections 53, 65, 74. Rules 116, 54(3), 119. Form 51. See *In re Huntly ex parte Goldstein* (1917), H. B. R. 209.

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CONTINGENT OR UNLIQUIDATED CLAIMS.

- Form and service of notice of motion.**
119. Where a contingent claim has been filed with a trustee, or one in the nature of unliquidated damages arising by reason of a contract, promise or breach of trust, and the trustee under the provisions of section 20 of the Act has been unable to make a compromise or other arrangement satisfactory to the inspectors in respect thereto, the trustee shall apply to a judge, by way of notice of motion, to value the claim, serving the claimant with a copy of the notice of motion in the ordinary manner provided by these rules. The trustee shall prior to the hearing of the motion file with the registrar a copy of the claim in question, and an affidavit or affidavits by the trustee, the debtor or of some other person having knowledge of the claim setting out as full particulars and information as to the claim as have been ascertained, also setting out what steps (if any) were taken to make a compromise or other arrangement in respect of the claim, and particulars of any offer of compromise or arrangement made by the trustee with the permission of the inspectors, and such other facts as the trustee deems advisable. The judge shall hear and dispose of the matter summarily and either on affidavits or *viva voce* evidence or both as to the judge shall seem best.
- Disposal by judge.**

**Cross References:** Sections 20, 44, 65. Rules 14-19.



## SETTLEMENTS AND PREFERENCES.

**120.** Applications by a trustee, or any person, to set aside or avoid under the Act, or any other Act or law, any settlement, conveyance, transfer, security or payment, or to declare for or against the title of the trustee to any property adversely claimed, and any proceedings under "The Winding-Up Act" against any past or present director, manager, liquidator, receiver, employee, or officer of any company, against whom a receiving order has been made, or which has made an authorized assignment, shall be to a Judge in chambers by notice of motion served in the ordinary manner as provided by these rules. The Judge may proceed in a summary manner to try the question or issue in the case or may adjourn the hearing, or may direct or settle any question or issue to be tried, or may give such directions for the preparation and filing of pleadings and for the trial of such question or issue, or may make such other order in the premises as to the judge shall seem best.

**Rules 120 to 122**  
Form and service of notice of application.  
Disposal by judge.

**121.** Any application or notice of motion under the preceding rule may contain a description of the land (if any) in question, and upon filing the same or a copy thereof, signed by the solicitor of the applicant, with the proper officer, a certificate of *lis pendens* may be issued for registration, and in case the said application or motion is refused in whole or in part, a certificate of such order may be issued for registration.

**Cross References:** Sections 6(1), 7, 63; 29-35, 3, 71(3), 65, 2(0), 66(2). Rules 14-19, 53, 152.

Rule 120 is framed in wide terms. See notes to the jurisdiction of the Court in section 63 on the question of declarations for or against the title of the trustee to property adversely claimed.

In neither the Act nor the Rules is there the counterpart of section 123 of *The Winding-up Act*, R. S. C. 1906, c. 144, which deals with summary proceedings against a past or present director, manager, liquidator, receiver, employee or officer. Until such a rule is enacted it would appear that the proper practice is to apply for leave under section 2(o), to proceed under *The Winding-up Act* in any case where it is desired to take advantage of section 123 of that Act.

Under Rule 120, a mortgage may be set aside as fraudulent and void in a summary way upon affidavit evidence: *In re Levine & Flaxgold* (1921), 1 C. B. R. 479; 20 O. W. N. 167 (Orde, J.); and so may an assignment, which is void under section 9: *Bartley's Trustee v. Hill* (1921), 20 O. W. N. 170 (Middleton, J.). *Semble*, as the rule provides a summary remedy, an action asking for the relief which might be had on motion under the rule, will be dismissed with costs: *Bartley's Trustee v. Hill, supra*.

## CONTRIBUTORIES TO INSOLVENT CORPORATIONS.

**122.** The demand of an authorized trustee on any contributory shall be in the prescribed form and there shall be no duty imposed on the authorized trustee to make demands on a *pro*

Form of demand.  
See form 37.



- Rules 123 to 127** *ratu* basis so far as the contributories of a debtor are concerned or to adjust rights as between contributories.
- Judgment by default.** **123.** If a contributory does not pay the authorized trustee the amount demanded and does not give notice in writing, to the trustee, disputing the demand within the time and in the manner provided by the Act, the authorized trustee may from and after the expiration of thirty days from the date of service of the demand, make an *ex parte* application to the Court in the prescribed form for judgment against the contributory and the Court may on such application, without notice to the contributory, give judgment in favour of the trustee for the amount demanded or such amount as the Court finds justly owing and for the costs of the application.
- See form 38.**
- Procedure where contributory disputes demand.** **124.** In the case where a contributory has given notice in writing to the trustee disputing the demand, within the time and in the manner provided by the Act, the trustee may, from and after the expiration of thirty days from the date of service of the demand, make application to the Court in the prescribed form for judgment against the contributory, giving the contributory at least four days' notice of such application, and the Court on the hearing of the application may proceed in a summary way to try the question or issue in the case or may adjourn the hearing or may direct and settle any question or issue to be tried between the authorized trustee and the contributory or may give such directions for the preparation and filing of pleadings or for the trial of such question or issue or may make such other order in the premises as to the Court shall seem best.
- See form 38.**
- More than one contributory may be included.** **125.** The authorized trustee may include in any application more than one contributory.
- Trustee to file papers on hearing.** **126.** At least two days before the hearing of any such application the authorized trustee shall file with the proper officer the verified statement of the affairs of the debtor; an estimate of the authorized trustee as to the realizable value of all property of the debtor, and a list of all proved or provable claims against the estate of the debtor in so far as the authorized trustee is able to ascertain.
- Execution may be stayed.** **127.** If it should appear to the Court that the issue of immediate execution under any judgment recovered or entered by an authorized trustee against a contributory would be an undoubted hardship on the contributory or would be unjust or inequitable, the Court may, on the application or request of the contributory and on such terms as to security or otherwise as the Court deems advisable, order that execution be stayed pending the adjustment of rights between contributories or for such



period as to the Court shall seem best. (W. U. Act, R. S. C. 1906, c. 144, s. 60).

**Rules**  
**128 to 132**

**128.** In case a contributory desires to have the Court adjust rights and liabilities as between contributories he may make application to the Court in the prescribed form setting out his grounds in an affidavit in the prescribed form. He shall give at least four days' notice of such application to all other contributories from whom he claims contributions. The Court may on an *ex parte* application direct the method of service of said notice, whether by personal service, mail or otherwise, as to the Court may seem best.

Procedure on adjustment of rights between contributories.

See forms 39 and 40.

**129.** The Court may on any such application order any one or more of the contributories of the debtor to pay into Court such amounts as may be found by the Judge to be just and equitable and in default of payment of the amount so found the Court may give judgment against any defaulting contributory directing payment of such amount to the applicant or to the trustee or otherwise and may dispose of the costs of such application.

Court to adjust

**130.** All moneys paid into Court shall be adjusted, divided and paid out according to the directions of the Judge and where the Judge deems advisable such moneys or any portion thereof may be paid out to the authorized trustee.

Payment out of moneys.

**Cross References:** Section 36. Forms 37 to 40.

These rules taken with section 36 provide a more flexible, expeditious and a less costly method of procedure than is given under *The Winding-up Act*. It will be some time before decisions appear in any number on this new procedure. Until such decisions are obtained, it has been thought better not to enter into a discussion of the questions connected with the subject of contributories, but to refer the reader for these matters to the standard works on Company Law.

#### EXAMINATION OF DEBTOR AND OTHERS.

**131.** Examinations under section fifty-six of the Act or any other examination may be held before a Registrar or before any person or officer who is qualified or authorized to hold examinations for discovery or of judgment debtors in accordance with the Rules, for the time being in force in civil actions or matters of the Court in the bankruptcy district or division in which the examination is held or to be held or before such other person as the Court on an *ex parte* application therefor may order. (Cf. E.R. 191.)

Procedure.

**132.** Such examination may be held in the bankruptcy district or division in which the debtor or other person to be

Place of examination.



**Rules  
133 to 137**

examined resides or in which he is served with the appointment for examination, or in which the debtor, or such other person, resided or carried on business at the date of the receiving order or authorized assignment, notwithstanding that such bankruptcy district or division may not be the same district or division in which the bankruptcy of the debtor occurred or in which the debtor made an authorized assignment or in which the proceedings are being carried on; or the examination may be held at such time and place and in such bankruptcy district or division in Canada as the Court on application may order. Such application, unless the Court otherwise directs, may be made *ex parte*.

**Appointment for.**

See form 62.

**133.** Any such registrar, person or officer empowered to hold examinations may grant, in duplicate, an appointment for examination in the form provided by the Appendix or in form to like effect.

**Service.**

**134.** A duplicate of such appointment shall be served upon the debtor or person to be examined at least forty-eight hours before the time of examination.

**Cross References:** Sections 56, 64(5) (6), 63(1), 4(4) (11), 71, 83. Rules 11, 34-49, 149, 143. Forms 62-64.

See as to service beyond the jurisdiction: *In re Wendt ex parte O. R.* (1889), 22 Q. B. D. 733; 61 L. T. 286; 6 Mor. 127; and see E. R. 183.

Service may, it is considered, be by registered prepaid post. See section 83: *In re McGrath ex parte O. R.* (1890), 24 Q. B. D. 466; 62 L. T. 122; 7 Mor. 20.

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**DISCHARGE.**
**Application.**

**135.** (1) In any case in which an application is made to the Court by a debtor for his discharge and the trustee reports to the Court any fact, matter or circumstance which would, under the Act, justify the Court in refusing an unconditional order of discharge, such application shall be deemed to be an opposed application within the meaning of section sixty-five (2) (c) of the Act. (E. R. 228).

(2) The Court may, on the application by a debtor for his discharge, cause the debtor to be brought before the Court for examination or further examination.

**Appeals.**

**136.** An appeal to the Appeal Court shall lie at the instance of the trustee, the debtor and or at the instance of any creditor or creditors, who oppose the discharge, from any order of the Court made upon the application for discharge. (E. R. 229).

**Evidence  
in answer  
to report.**

**137.** When a debtor intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report he shall at or before the time appointed for hearing the application for discharge give notice in writing to the trustee



specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the discharge of a debtor on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof, to the trustee and to the debtor at or before the time appointed for the hearing of the application. In either of such cases the judge or registrar may enlarge the hearing of the application as deemed advisable. (E.R. 231).

**Rules  
138 to 141**

**138.** (1) A debtor shall not be entitled to have any of the costs of or incidental to his application for discharge allowed to him out of his estate. (E.R. 232).

**Costs of  
application.**

(2) If the debtor does not make his application for discharge until after the trustee has paid the final dividend, he shall, before the order of discharge is signed or delivered out, pay to the trustee such remuneration and solicitor's costs as the Court may allow.

**139.** (1) Where the Court grants an order of discharge conditionally upon the debtor consenting to judgment being entered against him by the trustee for the balance or any part of the balance of the debts provable under the bankruptcy or authorized assignment which is not satisfied at the date of his discharge, the order of discharge shall not be signed, completed or delivered out until the debtor has given the required consent. The judgment shall be entered in the Court having jurisdiction in bankruptcy in the district or division in which the order of discharge is granted.

**Orders  
conditional  
on consent  
to judgment.**

**See forms 74,  
75 and 76.**

(2) If the debtor does not give the required consent within ten days of the making of the conditional order the Court may, on the application of the trustee, revoke the order or make such other order as the Court may think fit. (E.R. 233.)

**140.** The order of the Court made on an application for discharge shall be dated on the day on which it is made, and shall take effect from the day on which the order is drawn up and signed; but such order shall not be delivered out or gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appeal Court thereon. (E.R. 234.)

**Order.**

**See forms  
of orders.**

**141.** (1) An application by the trustee for leave to issue execution on a judgment entered pursuant to a conditional order of discharge shall be made to the Court in writing, and shall state shortly the grounds on which the application is made.

**Application  
for leave  
to issue  
execution.**

(2) The trustee shall give not less than four days' notice of the application to the debtor, and shall at the same time furnish him with a copy of the application. (E.R. 236.)



**Rules  
142 to 144**

Accounts  
of after-  
acquired  
property.

See form 77.

**142.** Where a debtor is discharged subject to the condition that judgment shall be entered against him, or subject to any other condition as to his future earnings or after-acquired property, it shall be his duty until such judgment or condition is satisfied, from time to time, to give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file in the Court and with the trustee a statement showing the particulars of any property or income he may have acquired subsequent to his discharge. (E.R. 237.)

Verification  
of statement  
of after-  
acquired  
property.

**143.** Any statement of after-acquired property or income filed by a debtor whose discharge has been granted subject to conditions, shall be verified by affidavit, and the trustee may require the debtor to attend before an examiner to be examined on oath with reference to the statements contained in such affidavit, or as to his earnings, income, after-acquired property, or dealings. Where a debtor neglects to file such affidavit or to attend for examination when required so to do, or properly to answer all such questions as the Court may decide to be proper, the Court may, on the application of the trustee, rescind the order of discharge. (E.R. 238.)

Application  
for modifi-  
cation  
of order.

**144.** Where after the expiration of one year from the date of any order made upon a debtor's application for a discharge, the debtor applies to the Court to modify the terms of the order on the ground that there is no reasonable probability of his being in a position to comply with the terms of such order, he shall give 14 days' notice by mail of the hearing of the application to the trustee and to all his creditors. (E.R. 239.)

**Cross References:** Sections 58-60, 65, 73, 74, 2(g). Rules 68-71, 2, 131-134. Forms 66-77, 81.

The English Rule corresponding with Rule 136, which gave a right of appeal to the Board of Trade, but not to the creditors, was held to be *intra vires*: *In re Stainton ex parte Board of Trade* (1887), 19 Q. B. D. 182; 57 L. T. 202; 4 Mor. 242.

Rule 138(1) does not apply to the costs of a successful appeal by a bankrupt from a refusal to grant a discharge: *In re and ex parte Nicholas* (1890), 7 Mor. 54.

If the debtor does not give the consent referred to in Rule 139 he cannot, on an application under Rule 139(2) to revoke, dictate to the Court that the only order to be made is to suspend his discharge for two years. The Court might suspend his discharge till he had paid a dividend of 50 cents on the dollar; but it cannot repeat its former order to suspend the discharge until the bankrupt consents: *In re Gaskell* (1904), 2 K. B. 478; 73 L. J. K. B. 656; 11 Mans. 125.

The fact that the debtor has not complied with the terms of Rule 142, is not a bar to an application by him under the last paragraph of section 58(5), for a modification of the terms of the Court's order: *In re Roberts & Co. ex parte Bonzoline Mfg. Co.* (1904), 2 K. B. 299; 73 L. J. K. B. 724; 11 Mans. 134.



## MISCELLANEOUS.

145. No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon. (E.R. 383.)

**Rule 145**

No lien  
on debtor's  
books.

**Cross References:** Sections 17, 56.

By this rule the trustee is entitled to possession of the books of account of the debtor, notwithstanding the lien of any person.

The right to possession must be distinguished from the right to inspection given by section 56(4). Under that section the trustee has a right to inspect any documents, even though they are subject to a lien; but the section confers no right of possession: *In re Andrew Motherwell of Canada, Ltd.* (1921), 20 O. W. N. 306 (Holmsted R.); *In re Toleman ex parte Bramble* (1880), 13 Ch. D. 885.

What are the books of account of the debtor is a question of fact. The assignment of an interest in a business carries the interest in the books of account: *In re West ex parte Good* (1882), 21 Ch. D. 868; 51 L. J. Ch. 831; and an assignment of book debts will carry the books: *In re White & Co. ex parte O. R.* (1884), 1 Mor. 77.

The rule is to be construed strictly. It does not extend to vouchers, counterfoils of cheques, books, correspondence and other papers, although such documents would be of material assistance to the trustee in preparing his accounts of the bankrupt's estate: *In re Winslow ex parte Godfrey* (1886), 16 Q. B. D. 696; 55 L. J. Q. B. 238; 3 Mor. 60. Nor does it apply to books of account in which the debtor has a joint property with third parties: *In re Burnand ex parte Baker, Sutton & Co.* (1904), 2 K. B. 68; 73 L. J. K. B. 413; 11 Mans. 113; but the trustee is entitled to reasonable facilities for inspecting them S. C.

Vouchers for payments made by solicitors for their client may be the property of the client: *In re Ellis and Ellis* (1909), 25 T. L. R. 38.

A solicitor has a lien over documents of his client on which he has spent skill and labour; but a solicitor of a company cannot acquire a lien over books which ought not according to the constitution of the company to be placed in his hands: *In re Anglo-Maltese Hydraulic Dock Co., Ltd.* (1885), 54 L. J. Ch. 730. A solicitor has a lien on papers in an action if he be discharged by client, *secus* if he discharges himself: *In re Rapid Road Transit Co.* (1909), 1 Ch. 96; and a trustee in bankruptcy or winding up has no higher right in this regard than the bankrupt, the bankruptcy or winding up of the client in the action being equivalent to the discharge of the solicitor and entitling him to the lien: *In re Moss*, 1 Ch. D. 130; *In re Rapid Road Transit Co., supra*. The winding up or bankruptcy of a client will not defeat any valid lien existing at the time of the winding-up or bankruptcy: *In re Capital Fire Insurance Association* (1883), 24 Ch. D. 408; *In re Rapid Road Transit Co., supra*; *Re Hemsworth ex parte Underwood* (1845), DeG. 190. Where documents are recovered by solicitors by negotiation and correspondence on the instructions of the trustee the solicitors have a lien on them for costs incurred under those instructions; but on the recovery of the documents no lien attaches in their favour for costs incurred under similar instructions given by the bankrupt prior to his bankruptcy; the rule with respect to costs of negotiation being in this respect different from that with respect to costs incurred in an action or arbitration: *Meguerditchian v. Lightbound* (1917), 2 K. B. 298; 86 L. J. K. B. 889; (1917), H. B. R. 176.

A solicitor cannot assert against documents which came into his hands during the winding up of any such lien as will interfere with



**Rules  
146 to 151**

the prosecution of the winding up: *In re Capital Fire Insurance Association* (1883), 24 Ch D. 408.

Non-compliance with Rules.

**146.** Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit. (E.R. 385.)

**Cross References:** Sections 12, 68(4), 84. Rules 30, 74, 152.

Interest on deposit of trustee.

**147.** Where an authorized trustee provides the security required by section 14(4) of the Act in cash, the amount thereof shall be paid by the authorized trustee to the Receiver General, and the authorized trustee shall receive interest thereon, payable yearly at the rate of three per cent. per annum.

Reckoning of days.

**148.** In all cases in which any number of days not directed to be clear days is prescribed by the Act or by these rules, or by any notice or order in reference to any proceeding under the Act, the same shall be reckoned exclusively of the date from which the computation is made, but inclusively of the day on which the act or proceeding referred to is to be done or taken.

Reckoning of days.

**149.** Where notice is to be given or service is required to be made a certain number of days before the day on which something is to be done, if the words "clear days" or "at least" or "not less than" are used, both the day of service or of giving notice and the day on which such thing is to be done shall be excluded from the computation.

Reckoning of time.

**150.** Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, days on which the offices of the court are closed shall not be reckoned in the computation of such limited time. (E.R. 4(2).)

Reckoning of time.

**151.** Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices of the Court are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking same, be held to be duly done or taken on the next day on which the said offices are open.

**Cross References:** Sections 68(5), 82. Rule 51.



**152.** The general practice of the Court in civil actions or matters before it, including the course of proceedings and practice in judges' chambers, shall in cases not provided for by the Act and amendments thereto, or these rules, and so far as the same are applicable and not inconsistent with the said Act or these rules, apply to all proceedings under the said Act. **Rule 152**

General  
practice  
under Act  
and Rules.

**Cross References:** Sections 2(1), 63. Rules 2, 25, 39, 43, 65, 71, 131.

As the filing of a petition in bankruptcy is equivalent to taking an initiatory step in a civil proceeding litigants in bankruptcy in Ontario may act in person, but they cannot act by any other persons, except a practising solicitor; thus an authorized trustee cannot file a petition for another person: *In re X.* (1920), 1 C. B. R. 459; 19 O. W. N. 12 (Holmested, R.), but he may apply to the Court to approve a composition agreement under section 13(5), and may therefore apply for an order appointing a time for hearing an application to approve such an agreement: *In re Shaw* (1920), 19 O. W. N. 153; but in contentious cases it would appear advisable that application to approve should be made by a solicitor: *In re Shaw, supra.*



## APPENDIX

## PART I.

## FORMS.

Forms Nos.  
1, 2

## No. 1.

*General Title.*In the ..... Court of .....  
In Bankruptcy

In the matter of the Bankruptcy

of

.....Debtor.

or

(IN THE MATTER of the Authorized Assignment of.....

..... Debtor).

Cross References: R. 7.

## No. 2.

*Creditors' Petition.*

(Title.)

(a) Insert  
name of  
debtor.

I, C.D. of .....  
 (or we, C.D. of .....)  
 hereby petition the Court that (a) .....  
 of the ..... of .....  
 in the Province of ..... lately carrying on  
 business at (or residing at) the .....  
 of ..... in the .....  
 of ..... be adjudged bankrupt and that  
 a receiving order may be made in respect of his estate, and say:—

1. That the said A.B. has at some time during the six months  
 next preceding the presentation of this petition carried on busi-  
 ness (or now resides) at .....  
 within the jurisdiction of this Court or (1) The greater portion



of the property of the said A.B. is situate at ..... **Form No. 2**  
within the jurisdiction of this Court.

2. That the said S.B. is justly and truly indebted to me (*or*  
us in the aggregate) in the sum of \$..... (*set out*  
*the amount of debt or debts and the consideration*).

3. That I (*or* we) do not, nor does any person on my (*or* our)  
behalf hold any security on the said debtor's estate, or on any  
part thereof, for the payment of the said sum.

*or*

That I hold security for the payment of (*or* part of) the  
said sum (but that I will give up such security for the benefit of  
the creditors of A.B. in the event of his being adjudged bank-  
rupt) (*or* ..... and I estimate the value of such security at  
the sum of \$.....).

*or*

That I, C.D., one of your petitioners, hold security for the  
payment of, etc.

That I, E.F., another of your petitioners, hold security for  
the payment of, etc.

4. That A.B., within six months before the date of the pre-  
sentation of this petition, has committed the following act (*or*  
acts) of bankruptcy, namely:—(*here set out the nature and*  
*date or dates of the act or acts of bankruptcy relied on*).

5. That ..... of .....  
..... is an authorized trustee  
under the Bankruptcy Act with authority in the locality of the  
debtor and is fit and qualified to act as trustee in respect of the  
estate of the said debtor.

Dated this ..... day of ....., 19..

(Signed) C. D.  
E. F.

Signed by the petitioner  
in my presence.

Signature of Witness,  
Address,  
Description.

### *Notice of Hearing.*

(*Title may be omitted if notice endorsed on Petition*).

Take notice that a Petition that you, A. B., of .....  
be adjudged bankrupt and that a receiving order may be made  
in respect of your estate will be presented and heard before The  
Honourable Mr. Justice .....  
in Chambers at ..... in the ..... of .....



**Forms Nos.** at the hour of ..... o'clock in the ..... noon or  
**3, 4** so soon thereafter as the Petition can be heard.

If you do not appear at the hearing the Court may make a receiving order and adjudge you bankrupt on such proof of the statements in the petition as the Court shall think sufficient.

Dated at ..... this ..... day of ..... 19..  
 To A. B. (*name of debtor*).

Petitioner (*or* A. B.  
 Solicitor for Petitioner).

**Cross References:** ss. 4, 3, 2(x), 46. RR. 2, 50, 74-84. FF. 47, 48. E.F. 11.

### No. 3.

#### *Affidavit of Truth of Statements in Petition* (Title.)

I, the petitioner named in the petition hereunto annexed, make oath and say:—

1. That I am the .....
2. That such of the statements in the said petition as relate to my own acts and deeds are true, and such of the statements as relate to the acts and deeds of any other person or persons, I believe to be true.

Sworn at, etc.

C. D.

**Cross References:** SS. 4(2), 79. RR. 31, 152. E.F. 12.

### No. 4.

#### *Affidavit of Truth of Statement in Joint Petition.* (Title.)

We, C. D., E. F., G. H., etc., the petitioners named in the petition hereunto annexed, severally make oath and say—

And first I, the said C. D., for myself say:—

1. That A. B. is justly and truly indebted to me in the sum of.....dollars as stated in the said before-mentioned petition.

2. That the said A. B. committed the act (*or* acts) of bankruptcy stated to have been committed by him in the said before-mentioned petition.

3. That A. B. has resided (*or* carried on business) at .....  
 (here verify facts set out in paragraph 1 of Petition).



And I, the said E. F., for myself say:—

Forms Nos.  
5, 6

4. That A. B. is justly and truly indebted to me in the sum of .....dollars as stated in the said before-mentioned petition.

And I, the said G. H., for myself say—

5. That A. B. is, etc. (*here follow paragraph 4*).

Sworn by the deponents

C. D.

C. D., E. F. and G. H., etc.

E. F.

G. H.

Cross References: SS. 4, 68(7), 79. RR. 31, 152. EF. 13.

### No. 5.

#### *Affidavit of Service of Petition.*

(*Title.*)

I, L. M., of ..... make oath and say:—

1. That I did on ..... day the ..... day of ..... 19..., serve the above named A. B. (*or the partners of the above-mentioned firm of.....*) with a copy of the above-mentioned petition by delivering the same personally to the said A. B. (*or C. D. a partner, or E. F. a person having at the time of service the control or management of the partnership business there*) (*or the President, Vice-President, Secretary, Treasurer, Manager (or other officer of the debtor if a Corporation), or upon E. F. (the person having at the time of service the control or management of the business of the Corporation) at (place) ..... before the hour of ..... in the .....noon.*

2. A sealed copy of the said petition is hereunto annexed.

Sworn, at, etc.

NOTE: If the service is effected on one partner on behalf of his firm, or on a person having at the time of service the control and management of the partnership business there or of a business carried on by any person in a name or style other than his own, the affidavit must after the word "at" contain words "being the principal place of business of the said."

Cross References: RR. 77—84. E.F. 15.

### No. 6.

#### *Notice of Substituted Service of Petition.*

(*Title.*)

To A. B.

Take notice that a bankruptcy petition has been presented against you in this Court by.....



**Form No. 7** of.....and that the Court has ordered that the sending of a copy of the petition together with a copy of the order for substituted service by registered post addressed to.....and/or the publication of this notice in the.....Gazette and/or in the.....newspapers (*following the terms of the order for substituted service*) shall be deemed to be service of the petition upon you; and further take notice that the said petition will be heard by this Court on the .....day of.....19.... at.....o'clock in the.....noon on which day you are required to appear, and if you do not appear the Court may adjudge you bankrupt and may make a receiving order against you in your absence, on such proof of the statements in the petition as the Court shall think sufficient.

The Petition can be inspected by you on application at my office.

Dated this .....day of.....A.D. 19...  
Registrar.

Cross References: RR. 77-84. E.F. 16.

### No. 7.

#### *Order for Substituted Service of a Petition.*

(Title.)

Upon the application of .....  
and upon reading the affidavit of.....  
.....of.....  
in the.....of ..... and  
the Bankruptcy Petition filed the .....day of  
.....A.D. 19 .....

It is ordered that the sending of a copy of the above-mentioned petition, together with a copy of this order by registered post, addressed to .....  
at....., and/or by publication in the .....Gazette and/or in the .....newspapers of the presentation of such petition and the time and place fixed for hearing the petition shall be deemed to be good and sufficient service of the said petition on the said .....

And that the costs of this application be

Dated this.....day of.....  
A.D. 19.....

Cross References: RR. 77-84. E.F. 17.



## No. 8.

Forms Nos.  
8, 9*Notice by Debtor of Intention to Oppose Petition.*

(Title.)

I, the above A. B., do hereby give you notice that I intend to oppose my being adjudged bankrupt and the making of a receiving order as prayed, and that I intend to dispute the petitioning creditor's debt (*or the act of Bankruptcy, or to contend that*  
*or as the case may be*) (*specifying the statements in the petition which he intends to deny or dispute.*)

Dated this .....day of.....19...

A. B.

To C. D. of .....

and to .....

and to the Registrar in Bankruptcy of the said Court.

Cross References: SS. 4(7) (8). RR. 87-90. E.F. 18.

## No. 9.

*Order to Stay Proceedings on Petition.*

(Title.)

Upon the hearing of the Bankruptcy petition against A. B. of..... this day, and the said A. B. appearing and denying that he is indebted to the petitioner (*when petition presented by more than one creditor, add the name of the creditor whose debt is denied*) in the sum stated in the petition (*or alleging that he is indebted to the petitioner in a sum of less amount than five hundred dollars (\$500) (or alleging that he is indebted to C. D., one of the petitioners, in a sum less than the sum stated to be due from him in the petition), it is ordered that the said A. B. shall within.....days enter into a bond in the penal sum of (the amount of the alleged debt and probable costs or such other sum as the Court may direct) with such sufficient surety or sureties as the Court shall approve of to pay (or deposit with the Registrar the sum of \$......as security for the payment of) such sum or sums as shall be recovered against the said A. B. by C. D. the petitioner (or one of the petitioners) in any proceeding taken or continued by him against the said A. B. together with such costs as shall be given by the Court in which the proceedings are had.*

And it is further ordered, that upon the said A. B. entering into the bond aforesaid with such surety or sureties, all proceedings on this petition shall be stayed until after the Court in



**Form No. 10** which the proceedings shall be taken shall have come to a decision thereon.

Dated this .....day of .....19....

**Cross References:** S. 4(7) (8). RR. 89-91, 21-25. FF. 10, 11, 12. E.F. 19.

### No. 10.

*Bond on Stay of Proceedings, Security, Etc.*

(Title.)

Know all men by these presents, that we, A. B. of etc. and C. D. of etc. and E. F. of etc., (*or some Guaranty Company approved by Court*) are jointly and severally held and firmly bound to L. M. of etc., in.....dollars to be paid to the said L. M. or his certain attorney, executors, administrators or assigns. For which payment to be made we bind ourselves and each and every of us, our and each of our heirs, executors and administrators (*or our successors and assigns*) jointly and severally, firmly by these presents.

Sealed with our seals, and dated this.....day of .....one thousand nine hundred and.....

Whereas a Bankruptcy petition against the said A. B., having been presented to the.....Court of.....he did appear at the hearing of the said petition and deny that he was indebted to the petitioner (*or to one or more of the petitioners*), (*or allege that he was indebted to the petitioner in the sum of ..... dollars only, or as the case may be.*)

Now, therefore, the condition of this obligation is such that if the above-bounden A. B., or the said C. D. or E. F., (*or Guaranty Company*) shall on demand well and truly pay or cause to be paid to L. M., his attorney or agent, such sum or sums as shall be recovered against the said A. B. by any proceedings taken or continued in any competent Court by the said L. M. for the payment of the debt claimed by him in the said petition, together with such costs as shall be given to the said L. M. by such Court (*or whatever the condition of the bond is*), this obligation shall be void, otherwise it shall remain in full force.

A. B. (L. S.)

C. D. (L. S.)

E. F. (L. S.)

Signed, sealed and delivered by the above bounden in the presence of—

NOTE: If a deposit of money be made the memorandum should follow the terms of the conditions of the bond. This form may be adapted to other cases.

**Cross References:** S. 4(7) (8). RR. 21-25. FF. 11, 12, E. F. 20.



## No. 11.

## Notice of Sureties.

(Title.)

Take notice that the sureties whom I propose as my security in the above matter (*here state the proceedings which have rendered the sureties necessary*) are (*here state the full names and descriptions of the sureties, and their residence for the last six months, therein mentioning the county or city, places, streets, and members, if any.*)

Dated.....day of.....19...

A. B.

L. M. of.....

Cross References: S. 4(7)(8). RR. 21-25. FF. 10, 12.  
E.F. 21.

## No. 12.

## Affidavit of Justification (a).

(Title.)

(a) This  
affidavit  
not neces-  
sary if  
surety is an  
approved  
Guaranty  
Co.

I, E. F. of....., one of the sureties for  
.....make oath and say:—

1. That I am a householder (*or as the case may be*) residing (*describing particularly the county or city, the street or place, and the number of the house, if any.*)

2. That I am worth property to the amount of \$..... (*the amount required*) over and above what will pay my just debts (*if security in any other action or for any other purpose, add, and every other sum for which I am now security*).

3. That I am not bail or security in any other matter, action, or proceeding, or for any other person except for C. D., at the suit of E. F., in the Court of.....in the sum of \$.....; for G. H. at the suit of I. K., in the Court of.....in the sum of \$.....(*specifying the several actions in which he has become bound.*)

4. That my property, to the amount of the said sum of \$.....(*and if security in any other action, etc. over and above all other sums for which I am now security as afore-said*), consists of (*here specify the nature and value of the property in respect of which the deponent proposes to become bondsman, as follows*), stock in trade, in my business of ..... carried on by me at.....of the value of \$..... of good book debts owing to me to the amount of \$.....



**Forms Nos. 13, 14** of furniture in my house at.....of the value of \$....., of a freehold (or leasehold) farm of the value of \$.....situate at ..... occupied by .....or of a dwelling-house of the value of \$..... situate at....., occupied by....., (or of other property, particularizing each description of property, with the value thereof.)

5. That I have for the last six months resided at ..... (describing the place of such residence, or if he has had more than one residence during that period, state it in the same manner as above directed.)

Sworn at, etc.....E. F.

**Cross References:** S. 79. RR. 26-33, 152. FF. 10, 11. E.F.22.

### No. 13.

#### *Dismissal of Petition.*

(Title.)

Upon hearing the petition of.....filed the .....day of.....19..., and upon reading.....and hearing.....

It is ordered that the said petition be dismissed (and that the petitioner do pay to the said A. B. the taxed costs thereof.)

Dated this.....day of.....19...

**Cross References:** S. 4(6) (8). R. 91. E.F. 24.

### No. 14.

#### *Receiving Order.*

(Title.)

On the petition of J. S. of ..... a creditor, filed the (*insert date*) and on reading.....and hearing.....and it appearing to the Court that the following act or acts of bankruptcy has or have been committed, viz.:—(*set out the nature and date or dates of the act or acts of bankruptcy on which the Order is made*).

The said A. B. is hereby adjudged bankrupt and a receiving order is hereby made against A. B. (*insert name, addresses and*



*description of debtor as set out in petition*) and (*insert name of* **Forms Nos.**  
*authorized trustee*) of the.....of..... **15, 16**  
 is hereby constituted receiver of the estate of the said debtor.

Date this.....day of.....

NOTE: If trustee requires debtor to attend at his office, then endorse following note: The above named debtor is required immediately after the service of this order upon him, to attend the above named authorized trustee at his office at ..... Such offices are open every week day from 10 a.m. to 4 p.m., except Saturdays when they close at 1 p.m.

#### *Indorsement on Order.*

The name and address of the solicitor to the petitioning creditor are (*insert name and address*).

**Cross References:** SS. 4(5), 3. RR. 50, 92-96. E.F. 30.

### **No. 15.**

#### *Order appointing Interim Receiver.*

(*Title.*)

Upon reading the application of.....  
 for the appointment of an Interim Receiver and the affidavit therein referred to and hearing.....  
 it is ordered that.....of the.....  
 of.....in the Province of.....  
 an authorized trustee, be and he is hereby constituted Interim Receiver of the property of the said A. B. (*here insert directions, if any*).

The said authorized trustee is hereby directed to take immediate possession of the property of the said A. B.

Dated this.....day of.....19...

**Cross References:** S. 5. RR. 85, 86. E.F. 14.

### **No. 16.**

#### *Order of Transfer of Proceedings.*

(*Title.*)

Upon application of A. B. and upon reading.....  
 and hearing....., and it appearing to the Court that (*state here special reason or reasons why order is made*), that the proceedings in the above matter



**Forms Nos.** should be transferred from.....to.....(*or,*  
**17, 18** *as the case may be*).

It is hereby ordered that the said proceedings in the above named matter be transferred from the above Court to the Court of the Bankruptcy division of.....

Dated this.....day of.....19...

**Cross References:** S. 4(11), 71. RR. 11, 12. E.F. 16.

### No. 17.

*Order restraining Action, etc., before Receiving Order.*

(*Title.*)

Upon the application of.....  
 and upon reading ....., it is ordered that L. M. of....., shall be restrained from taking any further proceedings in the action brought by him (*or, upon the judgment recovered or obtained by him*) against the said A. B. in (*here state the Court in which proceedings are*), *or*, it is ordered that the proceedings in the action (*or suit*) brought by him against the said A. B. in (*here state the Court in which proceedings are*) may be proceeded with on (*here insert the terms fixed by the Court*).

Dated this.....day of.....19...

**Cross References:** SS. 6(1), 7.

### No. 18.

*Assignment for the General Benefit of Creditors.*

THIS INDENTURE made (in duplicate) this.....  
 day of.....A.D. 19....

IN PURSUANCE OF "THE BANKRUPTCY ACT"  
 BETWEEN

.....  
 hereinafter called "the Debtor"  
 of the first part;  
 and

.....  
 hereinafter called "the Authorized  
 Trustee"

of the second part.

Whereas the Debtor is insolvent and desires to assign and deliver to the said Authorized Trustee all his property for dis-



tribution among.....creditors in pursuance of the Form No. 19  
said Act.

NOW THEREFORE THIS INDENTURE WITNESSETH that the debtor doth hereby assign, convey and assure unto the said Trustee, his successors and assigns forever, all his property which is divisible among creditors under and by virtue of the said Act.

To have and to hold all the said property unto and to the use of the said Trustee his successors and assigns on the trusts and to and for the uses, intents and purposes provided by the said Act.

Signed and sealed at the.....of  
.....in the Province of.....  
in the presence of

Witness :

**Cross References:** SS. 9, 10, 25. F. 19.

No. 19.

Canada } I, .....  
Province of } of the ..... of .....  
                  } in the Province of .....

To WIT:                                 make oath and say:

1. That I was present and saw the within Indenture and the duplicate thereof, duly signed, sealed and executed by ..... the parties thereto at the ..... of ..... in the Province of .....

2. That I know the said part and of the full age of twenty-one years.

3. That I am a subscribing witness to the said Indenture and duplicate.

Sworn before me at the .....of.....  
in the Province of .....  
this.....day of  
A.D. 19 .....

A Commissioner in B. R., etc.  
or A Notary Public in and for the province of .....

**Cross References:** SS. 11(11) (12), 79.



Forms Nos.  
20, 21

No. 20.

(a) This notice is pursuant to sec. 11(4) and sec. 42. *Notice to Creditors of First Meeting where Receiving Order or Assignment Made. (a).*

The Bankruptcy Act.

In the estate of.....  
authorized assignor, (or bankrupt)

Notice is hereby given that A. B. of.....  
was adjudged bankrupt and a receiving order made on the  
.....day of.....19...  
(or that A. B. of.....did on the.....  
day of.....19.....make an authorized  
assignment to the undersigned).

Notice is further given that the first meeting of creditors in  
the above estate will be held at.....  
on the.....day of.....19...  
at.....o'clock in the.....noon.

To entitle you to vote thereat proof of your claim must be  
lodged with me before the meeting is held.

Proxies to be used at the meeting must be lodged with me  
prior thereto.

And further take notice that if you have any claim against  
the debtor for which you are entitled to rank, proof of such  
claim must be filed with me within thirty days from the date  
of this notice, for from and after the expiration of the time  
fixed by subsection 8 of section 37 of the said Act I shall dis-  
tribute the proceeds of the debtor's estate among the parties  
entitled thereto having regard only to the claims of which I  
have then notice.

Dated at.....this.....day of  
.....19....

Authorized Trustee.

NOTE: When mailing this notice to creditors, a form of proof and  
form of proxy should be enclosed with each notice.

Cross References: SS. 11(4), 42, 45. RR. 112, 148, 149.  
FF. 22, 45, 48.

No. 21.

*Notice to Creditors where Debtor submits offer of Composition,  
Extension or Scheme.*

The Bankruptcy Act.

Re (James Brown),

Take notice that .....of the  
.....of....., in the Province  
of.....,has submitted to me for the



consideration of his creditors a proposal for a composition (or **Form No. 22** extension of time for payment of his debts).

Particulars of the Debtor's proposal and a summary of his statement of affairs are enclosed herewith.

A general meeting of the creditors of the debtor will be held at.....on the.....day of.....19....at the hour of.....o'clock in the.....noon.

The creditors qualified to vote at such meeting may, by resolution passed by a majority in number thereof holding two-thirds in amount of the proved debts, accept the proposal made by the debtor either as made or as altered or modified at the request of the meeting. If so accepted and if approved by the Court such proposal shall be binding on all the creditors.

Proof of debts, proxies and voting letters intended to be used at the meeting must be lodged with me prior thereto.

Creditors who prove their debts and whose proofs are admitted and who do not vote on the debtor's proposal shall be reckoned as voting against it.

Date at ..... this .....day of ..... 19....

Trustee.

NOTES:—

1. Creditors who have proved may vote for or against the debtor's proposal by means of a voting letter.

2. A form of proof of debt, proxy and voting letter are sent herewith.

**Cross References:** S. 13. RR. 98-106. FF. 22-31. E.F. 20.

**No. 22.**

*Voting Letter.*

The Bankruptcy Act.

In the Estate of .....authorized assignor (or bankrupt).

I,.....of .....a creditor in the above matter for the sum of.....hereby request the authorized trustee of the said estate to record my vote (a).....the acceptance of the proposal as set forth in the report of the authorized trustee hereto annexed or as altered or modified at the request of the meeting.

Dated this.....day of..... 19....

..... (Signature of Witness.) ..... (Signature of Creditor.)

**Cross References:** S. 13. RR. 98-106. FF. 21, 23-31. E.F. 81.

(a) Insert here the word "for" or the word "against" as the case may be.



Forms Nos.  
23, 24

No. 23.

*Proposal for a Composition.*

The Bankruptcy Act.

In the matter of .....  
of .....  
in the Province of .....

I, ....., the above  
named debtor, hereby submit the following proposal for com-  
position in satisfaction of my debts:—

1. That payment in priority to all other of my debts of all  
debts directed to be so paid in the distribution of the property  
of a bankrupt (or authorized assignor) shall be provided for as  
follows:—

*(Set out terms of proposal so far as relate to preferential  
claims.)*

2. That provision for payment of all the proper costs,  
charges and expenses of and incidental to the proceedings, and  
all fees and percentages payable to the trustee shall be made in  
the following manner:—

*(Set out proposal for provisions for fees, charges, costs, etc.)*

3. That the following composition shall be paid as herein-  
after mentioned on all provable debts:—

*(Set out terms of composition.)*

4. That the payment of the composition be secured in the  
following manner:—

*(Set out full names and addresses of sureties (if any) and  
complete particulars of all securities intended to be given.)*

Dated at . . . . . this . . . . .  
day of . . . . . A.D. 19 . . . . .

(Signed.)

Cross References: S. 13. RR. 98-106. FF. 21, 22, 24-31.  
E.F. 79.

No. 24.

*Proposal for an Extension of Time or Scheme.*

The Bankruptcy Act.

In the matter of .....  
of . . . . ., in the Province of  
.....

I, the above named debtor, hereby submit the following pro-  
posal for an extension of time from my creditors for payment of  
my debts, (or for a scheme of arrangement of my affairs in satis-  
faction of my debts.)



1. That . . . . . **Form No. 25**

(Set out terms of extension or scheme.)

2. That payment in priority to all other of my debts of all debts directed to be so paid in the distribution of the property of a bankrupt (or authorized assignor) is provided for as follows:—

(Set out or indicate by reference to the extension or scheme how it is proposed to satisfy preferential claims.)

3. That provision for payment of all the proper costs, charges, and expenses of and incidental to the proceedings, and all fees and percentages payable to the trustee is provided for as follows:—

(Set out or indicate by reference to the scheme how it is proposed to provide for fees, costs, charges, etc.)

4. That the payment of the terms of the said extension (or scheme) is to be secured in the following manner.

(Set out full names and addresses of sureties and give particulars of all securities.)

Dated at . . . . . this . . . . .  
day of . . . . . A.D. 19 . . . .

(Signed.)

**Cross References:** S. 13. RR. 98-106. FF. 21-23, 25-31.  
E.F. 80.

## No. 25.

### Resolution Accepting Composition.

#### The Bankruptcy Act.

In the matter of . . . . . of the . . . . .  
of . . . . . in the Province of . . . . .

Minutes of resolution come to and proceedings had at a meeting of creditors held at . . . . . in the Province of . . . . . this . . . . . day of . . . . . 19 . . . .

Chairman.

Resolved as follows:—(a)

That the debtor's proposal for a composition as set forth in the annexed paper writing marked "A" be accepted.

(a) Insert  
"unanimous-  
ly" where  
the resolu-  
tion is so  
carried.

Chairman.



Form No. 26

Number	Assenting Creditors' Signatures	Amount of Proof	Number	Dissenting Creditors' Signatures	Amount of Proof

NOTE: When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately.

Cross References: S. 13. RR. 98-106. FF. 21-24, 26-31. E.F.82.

No. 26.

Resolution Accepting Extension or Scheme of Arrangement.

THE BANKRUPTCY ACT.

In the matter of.....of the.....  
of.....in the Province of .....

Minutes of resolution come to and proceedings had at the  
first meeting of creditors held at.....  
in the Province of.....this.....day of.....  
.....19....

Chairman.

(a) Insert  
"unanimously"  
where the resolution is so  
carried.

Resolved as follows:—(a)

That the debtor's proposal for an extension of time (or  
scheme of arrangement) as set forth in the paper writing hereto  
annexed and marked with the letter "A" be accepted.

.....Chairman.

Number	Assenting Creditors' Signatures	Amount of Proof	Number	Dissenting Creditors' Signatures	Amount of Proof

NOTE: When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately.

Cross References: S. 13. RR. 98-106. FF. 21-25, 27-31. E.F. 83.



**No. 27.**Forms Nos.  
27 to 29*Order Appointing Day for Hearing.*

(Title.)

Upon the application of the Trustee.....  
 .....it is ordered that the application for the approval  
 by the Court of the composition (*or extension or scheme*) in this  
 matter shall be heard before me at my Chambers in the.....  
 of.....in the.....of.....on the.....  
 day of.....19...., at the hour of.....o'clock in  
 the.....noon.

Dated this.....day of.....19...

**Cross References:** S. 13. RR. 98-106. FF. 21-26, 28-31.  
 E.F. 85.

**No. 28.***Notice to Creditors of Application to Court to Approve Composition, Extension or Scheme.*

(Title.)

Take notice that application will be made to.....  
 .....in Chambers at.....on the.....  
 day of.....19...., at.....o'clock in the.....noon,  
 to approve the composition (*or extension or scheme of arrange-*  
*ment*) as proposed by the debtor and duly accepted by the  
 statutory majority of creditors at a meeting held on.....the  
 .....day of.....19....

Dated this.....day of.....19....

Authorized Trustee.

**Cross References:** S. 13. RR. 98-106. FF. 21-27, 29-31.  
 E.F. 87.

**No. 29.***Report of Authorized Trustee on Proposal for Composition, Extension or Scheme.*

(Title.)

The authorized trustee of the above estate hereby reports:—  
 That the debtor has lodged with him a proposal for a com-  
 position (*extension or scheme*) to be submitted to the creditors,  
 of which the following is a copy:—

(*here set out fully the terms of proposal.*)



**Forms Nos.  
30, 31**

That the liabilities, as shown by the debtor's statement of affairs, amount to the sum of \$.....and the assets are estimated by the debtor at the sum of \$.....after payment of preferential debts.

That the value of the assets is (*fairly estimated by the debtor*) (*or, as the case may be*).

That the terms of the debtor's proposal (*set out particulars of proposal and observations on the proposals and the debtor's conduct*).

Dated this ..... day of ..... 19...

Authorized Trustee

Address.

**Cross References:** S. 13. RR. 98-106. FF. 21-28, 30, 31. E.F. 81.

---

**No. 30.***Order Approving Composition or Scheme.*

(*Title.*)

On the application of the authorized trustee.....  
.....and on reading the report of the authorized trustee  
filed on the.....day of.....19..., and  
hearing .....and the Court being  
satisfied that the required majority of creditors under the said  
Act have duly accepted the composition (*or extension or scheme*)  
in the terms contained in the paper writing marked "A"  
annexed hereto and being satisfied that the said terms are  
reasonable and calculated to benefit the general body of creditors  
and that no facts have been proved which would justify the  
Court in withholding its approval, the said composition (*or*  
*extension or scheme*) is hereby approved.

Dated this.....day of.....19...

**Cross References:** S. 13. RR. 98-106. FF. 21-29, 31. E.F. 90.

---

**No. 31.***Order Refusing to Approve Composition, Extension or Scheme.*

(*Title.*)

On the application of the authorized trustee.....  
.....and on reading the report of the  
authorized trustee filed on the.....day of.....  
19..., and hearing .....and the  
Court being satisfied that the required majority of creditors



under the said Act have duly accepted the composition (or extension or scheme in the terms contained in the paper writing marked "A" annexed thereto), and being satisfied that the said terms are not reasonable or calculated to benefit the general body of creditors (or being satisfied that the case is one in which the Court would be required, if the debtor was adjudged bankrupt, to refuse his discharge) or (facts having been proved which would under the Act justify the Court in refusing, qualifying or suspending the debtor's discharge.)

The Court doth refuse to approve the said composition (or extension or scheme.)

Dated this.....day of.....19...

**Cross References:** S. 13. RR. 98-106. FF. 21-30. E.F. 90.

### No. 32.

(a) *Notice to Creditors of Meeting to Appoint new Trustee.* (a) under sec. 14(9).

#### THE BANKRUPTCY ACT.

In the matter of the Estate  
of

Bankrupt, (or authorized assignor).

Take Notice that the undersigned authorized trustee having been unable (or having failed) to give the security required by section 14(8) of the said Act, a meeting of creditors will be held at on the 19 at o'clock in the noon for the purpose of appointing a new authorized trustee.

Dated at this day of 19

Authorized Trustee.

**Cross References:** SS. 14(9)(10), 15. FF. 33-36.

### No. 33.

(a) *Resolution to Appoint or Substitute Another Authorized Trustee.*

#### The Bankruptcy Act.

In the Matter of the Estate of .....  
of the.....of.....in the  
Province of.....

Bankrupt,  
(or authorized assignor).



**Form No. 34** Minutes of Resolution come to and proceedings had at a meeting of creditors held at.....in the.....of  
.....this.....day of .....  
19....

Chairman

(a) Insert  
"unanimously"  
where the resolution is so  
carried.

(a) Resolved as follows

That (b).....of the.....of  
.....an authorized trustee, be henceforth  
appointed (or substituted) as the authorized trustee in the  
above estate for and in the place of.....  
the authorized trustee named in the receiving order (or to  
whom the authorized assignment was made).

(b) Insert  
name of new  
trustee.

Chairman.

Number	Assenting Creditors' Signatures	Amount of Proof	Number	Dissenting Creditors' Signatures	Amount of Proof

NOTE: When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately.

Cross References: SS. 14(10), 15. FF. 32, 34-36.

### No. 34.

(a) Under  
sec. 15(3).

(a) Notice of New or Substituted Trustee.

The Bankruptcy Act.

In the Matter of the Estate of  
of the ..... of .....in the  
Province of .....

Bankrupt,

(or Authorized Assignor).

Take Notice that the undersigned authorized trustee has  
been appointed (or substituted) as the authorized trustee of the  
above estate for and in the place of

the authorized trustee  
named in the receiving order (or to whom the authorized assignment  
was made).

Dated at.....this.....  
day of.....19....

Authorized Trustee.

Cross References: S. 15. FF. 32, 33, 35, 36.



**No. 35.****Forms Nos.  
35, 36***(a) Affidavit of New or Substituted Trustee.*

The Bankruptcy Act.

**(a) Under  
sec. 15(3).**

In the Matter of the Estate of .....  
 of the ..... of .....  
 in the Province of .....

Bankrupt,  
 (or Authorized Trustee).

I, (a) ..... (a) Name  
 of the ..... of ..... of new  
 in the Province of ..... Authorized Trustee, trustee.  
 make oath and say:—

1. That pursuant to the provisions of section 14(9) of the said Act I have been appointed the authorized trustee of the above estate in place of ..... the authorized trustee named in the receiving order (or to whom the authorized assignment was made) or

(1) That pursuant to the provisions of section 15 (1) (or 15 (2)) of the said Act I have been substituted as the authorized trustee of the above estate for ..... the authorized trustee named in the receiving order (or to whom the authorized assignment was made).

2. That hereto annexed and marked with the letter "A" is a true copy of the resolution of the creditors so appointing (or substituting) me trustee, which resolution was passed on the ..... day of ..... 19....

Sworn, etc.

Cross References: SS. 14(9) (10), 15. FF. 32-34, 36.

**No. 36.***Bond to Registrar under Section 14(8).**(Title.)*

Know all Men by these Presents that we (*name and address of authorized trustee*) and (*name and description of guarantor*) are jointly and severally held and firmly bound to ..... (*name of Registrar*), Registrar in Bankruptcy of the Court ..... (*name Court*) and to his successor or successors in office in the sum of \$..... to be paid to the said Registrar or to his successor or successors in office, for which payment well and truly to be made we bind ourselves and each and every of us, our and each of our heirs, executors, administrators and successors jointly and severally firmly by these presents.

Sealed with our seal and dated this ..... day of ..... 19...



**Forms Nos.  
37, 38**

Whereas the said.....(*name of authorized trustee*) is the authorized trustee of the estate of.....of..... under and by virtue of a receiving order bearing the date, the .....day of.....19... (*or* under and by virtue of a certain authorized assignment bearing date the..... day of.....19...);

And Whereas the estimated value of the assets of the said debtor as shown by his statement of affairs filed in this Court is the sum of.....;

Now Therefore the condition of this obligation is such that if the above bounden authorized trustee shall duly account and pay over and transfer all moneys and properties received or to be received by him as such authorized trustee in respect of the estate of said debtor then this obligation shall be void, otherwise it shall remain in full force.

**Cross References:** SS. 14(8) (9) (10). FF. 32-35.

**No. 37.**

*Demand by Trustee on Contributory under Sec. 36(6).*

The Bankruptcy Act.

In the matter of the estate of (A. B. Company)  
bankrupt (*or* authorized assignor).

It appears from the records of.....the above named corporation that you are a shareholder of such corporation and that the amount unpaid on your shares of the capital of said corporation is \$.....

I accordingly demand that you pay me within thirty days from and after the date of the service of this demand on you the sum of \$....., being part of (a) your liability in respect of your said shares.

(a) If amount demanded is total amount due strike out words "part of."

Dated at.....this.....day of.....19...

.....  
Authorized Trustee.

To.....

Contributory.

**Cross References:** S. 36(6). RR. 122-130. FF. 38-40.

**No. 38.**

*Application of Trustee for Judgment against Contributories of Insolvent Corporation.*

(Title.)

The trustee reports to the Court:—

That a receiving order was made against the above named debtor on the.....day of....., 19..., (*or*



that the above named debtor made an authorized assignment to the trustee on the.....day of.....19...).

**Form No. 39**

That the debtor is a corporation and that the following persons (*among others*) appear to be contributories under the Bankruptcy Act, namely—

(*Here give names and addresses of contributories against whom judgment is asked*).

That the trustee has demanded payment from each of the said contributories of the amount set opposite each of their respective names, namely—

Name of Contributory.

Amount Demanded.

That the amounts so demanded are for the purpose of paying the liabilities of the debtor.

That none of the said contributories have paid the amounts demanded, although more than thirty days have elapsed since each of said contributories have been served with the demand and evidence of such service is filed on this application.

That the following contributories have not disputed the said demand or any part thereof, namely—

That the following contributories have disputed the said demand, namely—

and a true copy of each notice of dispute given to the trustee is filed on this application.

The verified statement of affairs of the debtor, the trustee's estimate of the realizable value of the property of the debtor, and a list of proved or provable claims against the estate of the debtor so far as can be ascertained, are filed on this application.

The trustee accordingly, in pursuance of the said Act makes application to the Court for judgment against each of said contributories for the amount demanded from each thereof and the costs of this application or for such other order as the Court may deem advisable or expedient.

Dated this.....day of.....19...

.....  
Authorized Trustee.

**Cross References:** S. 36. RR. 122-130. FF. 37, 39-40.

### **No. 39.**

*Application of Contributory to Adjust Rights of Contributories.*

(*Title.*)

I, L. M. of.....do apply to this Court under the provisions of Section 36(11) of The Bankruptcy Act to adjust the rights of the contributories of the above named debtor



Form No. 40 among themselves on the grounds set forth in the annexed affidavit.

Dated this.....day of.....19...

L. M.

**Cross References:** S. 36. RR. 122-130. FF. 37-38, 40.

## No. 40.

*Affidavit in Support of Application to Adjust Rights of Con-  
tributories.*

(Title.)

I, L. M., of the.....of.....  
in the Province of.....make oath and say:—

1. That a receiving order was made against the above named debtor on the.....day of.....A.D. 19...., (or that the above named debtor made an authorized assignment to.....an authorized trustee on the.....day of.....19....).

2. That the debtor is a corporation and that I am one of the contributors and pursuant to a demand made upon me by the said authorized trustee, I did pay him on the.....day of .....19..., the sum of.....(or the authorized trustee has made application to this Court for judgment against me for \$.....).

3. Set out in the Schedule hereto annexed marked "Schedule A" is a list of all the contributories of the said debtor with their addresses and the estimated amounts for which they are liable as contributories set opposite each respective name, so far as I have been able to ascertain the same.

4. That set out in the Schedule hereto annexed and marked "Schedule B" is a list of all the contributories from whom I claim contribution.

5. That my grounds for claiming such contribution are as follows (*here set out grounds and any pertinent facts.*)

SWORN before me at the \_\_\_\_\_ of \_\_\_\_\_  
in the Province of \_\_\_\_\_  
.....this.....  
day of .....  
A.D. 19.....

A Commissioner in B. R., etc.  
or A Notary Public in and for.....

**Cross References:** S. 36. RR. 122-130. FF. 37-39.



**No. 41.****Forms Nos.  
41, 42**

*Notice to Persons Claiming to be Creditors of Intention to declare final dividend and requiring them to establish claim.*

## The Bankruptcy Act.

In the matter of the estate of .....  
of.....

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the..... day of.....19..., or such later day as the Court may fix, I shall proceed to make a final dividend without regard to such claim.

Dated this.....day of.....19...

Authorized Trustee.

To X. Y.

Address.

**Cross References:** S. 37(6). E.F. 173.

**No. 42.**

*Application of Trustee for his Discharge.*

(Title.)

The undersigned authorized trustee hereby applies to the Court for an order fully (or partially) discharging him from the performance of any further duties and obligations with respect to the above estate and for a release of the special security provided by the undersigned.

Attached hereto and marked with the letter "A" is a complete and itemized statement of all moneys realized by the undersigned from or out of the property of the bankrupt or assignor and of all moneys disbursed including expenses incurred and remuneration received or claimed by the undersigned.

That all of the property of the bankrupt or assignor has been sold or realized upon by the undersigned, with the exception of the following:—

(Here give full particulars, description and value of all property not sold or realized upon and reasons why not sold.)

That there are no disputes, actions or proceedings unsettled or pending between the authorized trustee and the debtor or any



**Forms Nos.** creditor or creditors of the estate or any other persons whatsoever  
**43, 44** except the following—

(Here give particulars, if any.)

Dated this.....day of.....19...

Authorized Trustee.

**Cross References:** S. 41. RR. 107-110. FF. 43, 44.

---

**No. 43.**

*Affidavit Verifying Application of Trustee for his Discharge.*

(Title.)

I,.....the authorized trustee named in the application hereto annexed make oath and say:—

That the several statements in or attached to the said application are within my own knowledge true.

SWORN at, etc.

C. D.

**Cross References:** SS. 41, 79. RR. 26-33, 107-110. FF. 42, 44.

---

**No. 44.**

*Order Discharging Authorized Trustee.*

(Title.)

UPON THE APPLICATION OF..... authorized trustee of the estate of ..... bankrupt (or authorized assignor), and upon hearing the authorized trustee and C.D., E.F., etc. (as the case may be).

IT IS ORDERED that the said authorized trustee be and he is hereby fully discharged from the performance of any further duties and obligations with respect to the said estate.

(or IT IS ORDERED that the authorized trustee be partially discharged from the performance of any further duties and obligations with respect to the said estate excepting as to any property which the trustee has not sold or realized upon).

IT IS FURTHER ORDERED that the special security provided by the authorized trustee be and the same is hereby released.

Dated this.....day of.....19...

**Cross References:** S. 41. RR. 107-110. FF. 42, 43.



**No. 45.***General Proxy.***Forms Nos.  
45 to 47**

## The Bankruptcy Act.

In the Estate of .....  
 I, (or We) ..... of  
 the ..... of ..... a creditor,  
 hereby appoint ..... of the .....  
 of ..... to be my (or our) general proxy in the  
 above matter (excepting only as to the receipt of dividends).

Dated at ..... this .....  
 day of ..... A.D. 19....

(Signed)

Signature of witness

Address

**Cross References:** SS. 42(13)(19), 13(4). F. 46. E.F. 64.**No. 46.***Special Proxy.*

## The Bankruptcy Act.

In the matter of the Estate of .....  
 I, ..... of the .....  
 of ..... a creditor, hereby appoint .....  
 ..... of the ..... of .....  
 ..... as my proxy at the meeting of creditors  
 to be held on the ..... day of ..... 19..., or  
 any adjournment thereof, to vote.

Dated at ..... this ..... day of .....  
 ..... A.D. 19....

(Signed)

Signature of witness.

**Cross References:** S. 42(13)(19), 13(4). F. 45. E. F. 65.**No. 47.***Proof of Debt.*

## The Bankruptcy Act.

In the matter of the estate of .....  
 of .....  
 I, ..... of the .....  
 of ..... in the Province of .....  
 do solemnly declare and say:—

1. That I am the ..... of the under-  
 mentioned creditor and have knowledge of all circumstances  
 connected with the debt hereinafter referred to.



**Form No. 48**

(a) The account attached must show the consideration such as "goods sold and delivered" or "moneys lent."

(b) Here state particulars of all securities held and where the securities are on the property of the debtor assess the value of each thereof—and give dates when given.

2. That the said.....was at the date of the authorized assignment (*or* receiving order) namely: the .....day of.....19..., and still is justly and truly indebted to.....in the sum of.....as shown by the account hereto annexed and marked "A."

(a)

3. That the said.....has not, nor has any person by his order to my knowledge or belief for his use, had or received any manner of satisfaction or security whatsoever save and except the following:—

(b)

AND I MAKE this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

Declared before me at the .....of.....  
in the Province of.....  
this.....day of .....  
.....A.D. 19....

A Commissioner in B. R., etc., *or* A Notary  
Public in and for .....

**Cross References:** SS. 2(n), 13(3) (4) (5), 44-50, 53. RR. 115, 116. F. 48; *cf.* F. 2. E.F. 60.

**No. 48.***Proof of Debt of Workmen or Others.***The Bankruptcy Act.**

IN THE ESTATE OF.....  
the Debtor.

I,.....of the..  
.....of .....  
Do SOLEMNLY DECLARE AND SAY:—

1. That I was the foreman (*or* book-keeper *or* as the case may be) of the above named debtor at the date of the receiving order (*or* at the date of the authorized assignment) namely—the.....day of.....19... and I have knowledge of the facts and matters hereinafter referred to.

2. That the said debtor was at the said date and still is justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in the sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or



employees in the employ of the said debtor in respect of services rendered by them respectively to the debtor during such period before the date of the receiving order (*or* authorized assignment) as are set out against their respective names in the fifth column of such schedule for which said sums, or any part thereof, I say that they have not, nor has any of them, had or received any manner of satisfaction or security whatsoever.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

DECLARED before me at the.....  
of.....in the Province of.....  
this.....day of.....A.D. 19...  
.....  
A Commissioner in B. R., etc.

## SCHEDULE.

1 No.	2 Full name of workman	3 Address	4 Description	5 Period over which wages due	6 Amount due

Cross References: SS. 2(n), 13(3)(4)(5); 44-50, 53. RR. 115, 116. F. 47; cf. F. 2. E.F. 62.

## No. 49.

*Notice of Election to retain Leasehold Property under  
Section 52.*

## The Bankruptcy Act.

In the Estate of .....of  
.....

Take notice that I hereby elect to retain the premises (*here describe premises*) occupied by the above named bankrupt (*or* authorized assignor) under a certain lease dated.....  
.....for the unexpired term of such lease (*or* for the following period.....  
of the unexpired term of said lease).



Forms Nos. Dated at ..... this.....  
50, 51 day of..... 19.....

.....  
 Authorized Trustee.

To E. Z., Landlord.

**Cross References:** S. 52 F. 50.

**No. 50.**

*Notice of Disclaimer of Lease under Section 52.*

The Bankruptcy Act.

In the Estate of..... of the.....  
 of.....

Take notice that I hereby disclaim the lease dated.....  
 .....whereby the following premises, namely—  
 (*here describe premises*) were let to..... at a rent of  
 .....

Dated at..... this.....  
 day of..... 19.....

.....  
 Authorized Trustee.

To E. Z., Landlord.

**Cross References:** S. 52. F. 49.

**No. 51.**

*Notice of Disallowance of Claim.*

The Bankruptcy Act.

In the Estate of.....

Take notice, that, as trustee of the above estate, I have this  
 day disallowed your claim against such estate (a) (to the extent  
 of \$ ) on the following grounds:—

(a) If proof  
 wholly  
 rejected  
 strike out.

And further take notice that if you are dissatisfied with my  
 decision in respect of your proof, you may apply to the Court to  
 reverse or vary the same, but, subject to the power of the Court  
 to extend the time, no application to revise or vary my decision  
 in disallowing your proof will be entertained after the expira-  
 tion of thirty days from this date.

Dated at the..... of.....  
 this..... day of..... A.D. 19.....

.....  
 Authorized Trustee.

**Cross References:** S. 53. RR. 117-118.



## No. 52.

## STATEMENT OF AFFAIRS.

## THE BANKRUPTCY ACT.

*Re Estate of (James Brown) Authorized Assignor (or Bankrupt).*

To the Debtor:—

You are required to fill up, carefully and accurately, this sheet and such of the several sheets attached hereto as are applicable showing the state of your affairs on the 19 ; such sheets when filled up will constitute your Statement of Affairs and must be verified by oath or declaration.

## LIABILITIES

(as stated and estimated by debtor).

1. Unsecured liabilities as per List "A" ..... \$.....
2. Secured creditors as per List "B" ..... \$.....
- Less estimated value of securities ..... \$.....
- Expected to rank for ..... \$.....
3. Liabilities on bills or notes endorsed or given for accommodation as per List "C" \$.....
- Of which it is expected will rank against the Estate for dividend ..... \$.....
4. Preferred creditors as per List "D" ..... \$.....
5. Contingent or other liabilities as per list "E" estimated to rank for ..... \$.....
- Total Liabilities ..... \$.....
- Surplus ..... \$.....

I, ..... of the ..... of ..... make oath and say that the above statement and the several Lists hereunto annexed and marked A, B, C, &c., are to the best of my knowledge and belief a full, true and complete statement of my affairs on the ..... day of ..... A.D. 19 .. and fully disclose all my property of every description in possession and in reversion as defined by Section 25 of the Act.

SWORN before me  
at the ..... of .....  
in the province of .....  
this .... day of ..... A.D. 19 ..

## ASSETS

(as stated and estimated by debtor).

- (a) Stock-in-Trade at cost price not exceeding fair market value ..... \$.....
- (b) Trade Fixtures, fittings, utensils, etc. .... \$.....
- (c) Book Debts, promissory notes, etc., as per List "F"— ..... \$.....
- Good ..... \$.....
- Doubtful ..... \$.....
- Bad ..... \$.....
- Estimated to produce ..... \$.....
- (d) Cash in Bank of ..... \$.....
- (e) Cash on Hand ..... \$.....
- (f) Farming Stock ..... \$.....
- (g) Machinery, equipment and plant ..... \$.....
- (h) Real Estate as per List "G" ..... \$.....
- (i) Surplus from securities in hands of creditors fully secured ..... \$.....
- (j) Other property, viz.:— ..... \$.....

If Debtor is a Corporation, add:—

- Amount of capital subscribed ..... \$.....  
Amount paid thereon ..... \$.....  
Balance subscribed and unpaid ..... \$.....  
Estimated to produce ..... \$.....

Total assets  
Deficiency



Form No. 52

"A."

*Unsecured Creditors.*

(The names to be arranged in alphabetical order and numbered consecutively).

No.	Name	Address	Amount of Claim

Signature

Dated 19 .

"B."

*Secured Creditors.*

No.	Name of Creditor	Address	Amount of Debt.	Particulars of Security	When Given	Estimated Value of Security	Balance of Debt Unsecured

Signature

Dated 19 .

"C."

*Liabilities on Bills or Notes endorsed or given for accommodation.*

No.	Name of Acceptor or Maker	Address	Date when Due	Amount	Holder's Name and Address	Amount expected to rank against estate for dividend

Signature

Dated 19 .



"D."

Form No. 52

*Preferential Creditors for Wages, Rent, etc.*

No.	Name of Creditor	Address and Occupation	Nature of Claim	Period during which Claim accrued due	Amount of Claim	Amount payable in full	Difference ranking for Dividends

Signature

Dated

19 .

"E."

*Contingent or Other Liabilities.*

(Full particulars of all liabilities not otherwise scheduled to be given here.)

No.	Name of creditor or claimant	Address and occupation	Amount of liability or claim	Amount expected to rank for dividend	Date when liability incurred		Nature of liability
					Month	Year	
			\$ c.	\$ c.			

Signature

Dated

19 .

"F."

*Debts due to the Estate, including bill of exchange, promissory notes, lien notes and chattel mortgages.*

No.	Name of Debtor	P. O. Address	Occupation	Good	Amount of Debt.	
					Doubtful	Bad

Signature

Dated

19 .



Forms Nos.  
53, 54

"G."

*Real Estate or Immovable Property owned by Debtor.*

Description of Property	In whose Names does Title stand	Total Value	Particulars of Mortgages, Hypothecs or other Encumbrances			Equity or Surplus
			Name	Address	Amount	

Signature

Dated 19 .

Cross References: S. 54. R. 97. E.F. 34.

**No. 53.***Notice to Debtor of Meeting of Creditors.*Re (*James Brown*) debtor.

Take notice that a meeting of your creditors will be held at.....on the.....day of .....19..., at the hour of.....o'clock in the.....noon at.....and that you are required to attend thereat and submit to such examination and give such information as the meeting may require.

And further take notice that if you fail to comply with the requirements of this notice you will be guilty of contempt of Court and may be punished accordingly.

Dated at ..... this .....day of .....19....

Authorized Trustee.

To

The above named debtor.

Cross References: SS. 54, 56. R. 113. F. 52.

**No. 54.**

*Affidavit of Person in support of Order of Committal.*  
(Title.)

I, ..... of the ..... of ..... make oath and say:—



1—That..... of ..... **Form No. 55**  
 was at the order of this Court made on .....the  
 .....day of.....19..., ordered  
 to

(Here set out the order).

2—That a copy of the said order was duly served on the  
 said.....

3—That the said .....  
 has failed to obey such order.

SWORN at, etc.

L. M.

**Cross References:** SS. 56, 65(3), 79. RR. 26-33, 49. E.F.  
 121.

### No. 55.

*Affidavit in support of Application for Committal of Debtor for  
 Contempt under Section 54.*

(Title.)

I, ....., the  
 authorized trustee of the estate of the said Debtor make oath  
 and say:—

1—(That the said debtor did attend at the first meeting of  
 his creditors held on the.....day of.....  
 .....19..., at .....and  
 wilfully refused to submit to be examined at such meeting in  
 respect of his property (or his creditors), the submitting to  
 examination being a duty imposed upon him by The Bankruptcy  
 Act).

(1—(a) That the said debtor did wilfully fail to attend a (a) In case  
 meeting of his creditors held on the ..... meeting in  
 day of.....19, , at ..... question is  
 (or to wait on me at my office on the.....day of..... “first  
 .....19.. ), the attending such meeting (or waiting “meeting”  
 on me) being a duty imposed upon him by The Bankruptcy change  
 Act). “a” to “the  
 first.”

(or 1—That the said debtor has wilfully failed to execute  
 (here describe the deed, etc., that he has failed to execute), the  
 execution of such deed when required by me being a duty im-  
 posed upon him by the Bankruptcy Act).

2—(That the said debtor was on the ..... day  
 of ..... 19..., duly served with a notice, a  
 copy of which is hereunto annexed, by leaving the same at his  
 usual place of residence, requiring him to attend the said meet-  
 ing, (or to execute the above-mentioned deed, etc.).

(or 1—That the said debtor has wilfully failed to perform  
 the duty imposed upon him by The Bankruptcy Act, section



**Forms Nos. 54** (*here insert any act he has been required to do by any special order of the Court, stating the day on which the order was made*).  
**56, 57**

(2—That the said debtor was duly served with a copy of such order by leaving the same at his usual place of residence on the.....day of .....19....).

(or 1—That the said debtor has failed to deliver up possession of (*here state the property he has failed to deliver up*) which property is divisible amongst his creditors under the said Act and which said property was (*or is*) in his possession or control, he having been required by me to deliver up the said property by notice, a copy of which is hereunto annexed, and which notice was duly served upon him on the.....day of .....19...., at.....).

SWORN at, etc.

Authorized Trustee.

**Cross References:** SS. 54, 79. RR. 14-19, 26-33, 49, 113. FF. 56-59. E.F. 125.

### No. 56.

*Notice of Application for Committal under Section 54.*

(*Title.*)

To the said A. B.

Take notice that an application will be made on behalf of .....the authorized trustee of the property of the said debtor before The Honourable Mr. Justice.....at his Chambers.....at.....in the.....of.....at the hour of.....o'clock in the.....noon or so soon thereafter as the application may be heard for an order for your committal to gaol for contempt of this Court, you having failed to perform the duty imposed on you by the fifty-fourth section of the said Act (*here set out the duty he has failed to perform*).

And further take notice that you are required to attend the Court on such day at the hour before stated to show cause why an order for your committal should not be made.

Dated this.....day of.....19....

**Cross References:** SS. 54, 65(3). RR. 14-19, 49, 113, 152. FF. 55, 57-59. E.F. 128.

### No. 57.

*Order for Committal under Section 54.*

(*Title.*)

Upon the application of the authorized trustee of the property of the Debtor, and upon hearing the Debtor (*or if he does*



*not appear so state*), and reading the affidavit of (*here insert name and description of person by whom the notice to show cause was served*), and upon reading the affidavit of (*enter evidence*), and it appearing that the Debtor has been guilty of a contempt of this Court by having failed to (*here follow the notice*), it is ordered that the Debtor do stand committed to (*here insert gaol*) for his contempt, for the period of..... from the execution of the warrant issued hereunder.

Dated this .....day of .....19...

**Cross References:** SS. 54, 65(3). RR. 49, 152. FF. 55-56, 58-59. E.F. 132.

### No. 58.

#### *Warrant for Committal for Contempt.*

(*Title.*)

To X. Y., officer of this Court, and to the Governor or Keeper of the (*here insert the gaol*).

Whereas by an order of this Court bearing date the.....day of.....19..., it was ordered that the said debtor (or L. M. of.....) should stand committed for contempt of this Court.

These are therefore to require you the said X. Y. to take the said A. B. (*or* L. M.) and to deliver him to the Governor or Keeper of the above-named gaol, and you the said Governor or Keeper to receive the said A. B. and him safely to keep in the said gaol and in your custody for a period of..... from the date of the execution of this warrant, or for such shorter period as the Court shall order, and you the said Governor or Keeper shall, while the said A. B. is in your custody, and at all times when the Court shall so direct, produce the said A. B. before the Court.

Dated this .....day of .....19...

**Cross References:** SS. 54, 65(3), 72. RR. 44-49. FF. 55-57, 59-61. E.F. 134.

### No. 59.

#### *Order for Discharge from Custody on Contempt.*

(*Title.*)

Upon the application made this ..... day of.....for A.B., who was committed to gaol for contempt by order of this Court, dated the.....day of.....19..., and upon reading his affidavit showing that he has cleared (*or* is desirous of clearing) his contempt, and has paid the costs occasioned thereby, and upon hearing the authorized trustee (*or* C.D. of.....), it is ordered that the Governor or



**Forms Nos.** Keeper of (*here insert name of gaol*) do discharge the said A. B.  
**60, 61** out of his custody, as to the said contempt.

Dated this .....day of .....19...

**Cross References:** S. 54. RR. 44-49. E.F. 135.

---

**No. 60.**

*Warrant of Seizure.*

(*Title.*)

Whereas on the.....day of ..... 19...,  
 a receiving order was made against the said debtor (*or* an  
 authorized assignment was made by the said debtor) and it has  
 been made to appear that (a) (*here set out facts bringing within*  
*either (a), (b) or (c) of Sec. 55*).

These are therefore to require you forthwith to enter into  
 and upon the house and houses, and other the premises of the  
 said debtor, and also in all other place and places belonging to  
 the said debtor where any of his goods and moneys are, or are  
 reputed to be; and there seize all books, papers, money and goods,  
 except only such property which is not divisible among his credi-  
 tors as provided by section 25 of The Bankruptcy Act.

And that which you shall so seize you shall safely detain and  
 keep in your possession until you shall receive orders in writing  
 for the disposal thereof from the authorized trustee; and in case  
 of resistance or of not having the key or keys of any doors or  
 lock of any premises belonging to the said debtor where any of  
 his goods are or are suspected to be, you shall break open, or  
 cause the same to be broken open for the better execution of this  
 warrant.

Dated this .....day of .....19...

To X. Y., the officer of this Court and his assistants.

**Cross References:** SS. 55, 72. RR. 44, 45. FF. 58, 61.  
 E.F. 138.

---

**No. 61.**

*Warrant of Arrest against Debtor.*

(*Title.*)

To X. Y. the officer of this Court and all peace officers within  
 the jurisdiction of the said Court, and to the Governor or Keeper  
 of the (*here insert gaol*).



WHEREAS, by evidence taken upon oath, it has been made to appear to the satisfaction of the Court that there is probable reason to suspect and believe that the said A. B. has absconded, or is about to abscond from Canada, with a view of avoiding payment of the debt in respect of which the bankruptcy petition was filed (*or of avoiding appearance to a bankruptcy petition*) (*or avoiding examination in respect of his affairs*) (*or otherwise avoiding, delaying or embarrassing the proceedings in bankruptcy against him*).

(Or that there is probable cause for believing that the said A.B. is about to remove his goods with a view of preventing or delaying possession being taken of them by the trustee of the property of the said A.B.)

(Or that there is probable ground for believing that the said A.B. has concealed or is about to conceal or destroy any of his goods or any books, documents or writings which might be of use to the trustee of the property of the said A. B. or to the creditors of the said A. B., in the course of the bankruptcy (*or authorized assignment*) proceedings.

(Or whereas by evidence taken upon oath it has been made to appear to the satisfaction of this Court that the said A. B. has removed certain of his goods and chattels in his possession above the value of \$25.00 without the leave of the Trustee, that is to say) (*here describe the goods and chattels*).

These are therefore to require you the said (*here name bailiff or other officer*) to take the said A. B. and to deliver him to the Governor or Keeper of the above named gaol, and you the said Governor or Keeper to receive the said A. B. and him safely to keep in the said gaol until such time as this Court may order.

Dated this .....day of .....19...

Cross References: SS. 55, 72. RR. 44, 45. FF. 58, 60. E.F. 139.

## No. 62.

### *Appointment for Examination of Debtor or Others.*

#### The Bankruptcy Act.

In the matter of the estate of .....  
.....authorized assignor (*or bankrupt*).

Upon the application of the trustee in the above matter I do hereby appoint .....  
the.....day of.....A.D. 19.....  
at the hour of.....o'clock in the .....noon  
at .....in the.....  
of .....for the examination



**Forms Nos.** upon oath before me of .....  
**63, 64** the above named Debtor (or .....  
 an agent, clerk, servant, officer, director or employee *as the case*  
*may be*, of the above named debtor); under the said Act.

Dated at ..... this .....  
 day of ..... A.D. 19....

.....  
 Registrar (or Special Examiner)  
 (or other proper officer).

**Cross References:** S. 56. RR. 131-134. FF. 63, 64.

### No. 63.

#### *Declaration by Shorthand Writer.*

##### The Bankruptcy Act.

In the matter of the estate of .....  
 I, ..... of the  
 ..... of ..... in the Province of .....  
 ..... the shorthand writer appointed by the  
 Registrar (or Special Examiner or *as the case may be*) to take  
 down the examination of .....  
 ..... do make oath and say that I will truly and  
 faithfully take down the question and answers put and given  
 by the said .....  
 in this matter, and will deliver true and faithful transcripts  
 thereof as such Registrar (or Special Examiner or *as the case*  
*may be*) may direct.

SWORN before me at the ..... of .....  
 in the Province of ..... this .....  
 day of ..... A.D. 19....

.....  
 Registrar (or Special Examiner)  
 (or *as the case may be*).

**Cross References:** S. 56. RR. 38, 131-134. FF. 62, 64.  
 E.F. 71.

### No. 64.

#### *Notes of Examination of Debtor or Others.*

##### The Bankruptcy Act.

In the matter of the estate of .....  
 authorized assignor (or bankrupt)

Examination of .....  
 before Mr. ....



(Registrar or Special Examiner) the ..... **Forms Nos.**  
 day of ..... A.D. 19.... **65, 66**

The above-named .....  
 being sworn and examined at the time and place above men-  
 tioned upon the several questions following being put and pro-  
 pounded to him, gave the several answers thereto respectively  
 following each question, that is to say:—

These are the notes of the examination referred to in the  
 memorandum of the examination of .....  
 taken before me this .....  
 day of ..... 19....

Registrar (or Special Examiner).

.....  
 Stenographer.

**Cross References:** S. 56. RR. 38, 131-134. FF. 62, 63.  
 E.F. 72.

### No. 65.

#### *Order to Postmaster General under Section 57.*

(Title.)

Upon the application of .....  
 the authorized trustee of the property of the above debtor, it is  
 ordered that for a period of three months from the.....  
 day of.....19..., all post letters, telegrams  
 and postal pockets directed or addressed to the said debtor, at  
 (a) shall be re-directed, sent or delivered by the Postmaster  
 General, or officers acting under him to, (b) except any letter on  
 which there is a specific direction signed by the authorized trustee  
 that it is to be delivered as addressed, if possible, and that  
 a copy of this order be forthwith transmitted by the authorized  
 trustee to the Postmaster General and to the Postmaster in  
 charge of the Post Office at .....  
 (a) here insert the full addresses.  
 (b) the said trustee at or otherwise as the court may direct.

Dated this .....day of .....19...

**Cross References:** E.F. 140. S. 57.

### No. 66.

#### *Application for Order of Discharge.*

(Title.)

I, A. B. of the .....  
 of .....  
 in the Province of .....  
 having been adjudged bankrupt on the .....day



**Forms Nos.** of ..... A.D. 19...., or having made  
67, 68 an authorized assignment on the ..... day of  
 ..... 19...., and being desirous of obtaining my dis-  
 charge, hereby apply to the Court to fix a day for hearing my  
 application.

Annexed hereto is the certificate of the authorized trustee  
 certifying the number of my creditors.

Dated at .....  
 this ..... day of ....., 19....

(Signed), A. B.

To the Registrar of the ..... Court.

**Cross References:** SS. 58-61. RR. 135-144. FF. 67-77,  
 80-81. E.F. 105.

---

**No. 67.**

*Notice to Trustee of Application for Discharge.*

(Title.)

The bankrupt (or authorized assignor) .....  
 having applied to the Court for his discharge, the Court has  
 fixed the ..... day of ..... 19....,  
 at ..... o'clock in the ..... noon  
 at ..... for hearing the  
 application.

Dated at .....  
 this ..... day of ..... 19....

.....  
 Registrar.

To .....  
 Authorized Trustee of the Estate of the said .....

**Cross References:** SS. 58-61. RR. 135-144. FF. 66, 68-77,  
 80-81. E.F. 107.

---

**No. 68.**

*Notice to Creditors of Application for Discharge.*

(Title.)

Take notice that the above named bankrupt (or authorized  
 assignor) has applied to the Court for his discharge, and that  
 the Court has fixed the ..... day



of .....at..... o'clock. **Forms Nos.**  
 in the .....noon, at ..... **69, 70**  
 for hearing the application.

.....  
 Authorized Trustee.

NOTE: See sections 58, 59 and 60 of *The Bankruptcy Act* dealing with the discharge of a debtor.

**Cross References:** SS. 58-61, 83. RR. 135-144, 16, 17.  
 FF. 66-67, 69-77, 80-81. E.F. 108.

### No. 69.

*Order granting Discharge Unconditionally.*

(Title.)

On the application of A.B. of .....  
 adjudged bankrupt on the .....day of .....  
 19...., (or who made an authorized assignment on the.....  
 .....day of .....19....) and upon  
 taking into consideration the report of the authorized trustee as  
 to the bankrupt's conduct and affairs and upon hearing the  
 authorized trustee and C.D., E.F., etc., creditors, (*as the case  
 may be*).

And whereas it has not been proved that the bankrupt  
 (or authorized assignor) has committed any of the offences  
 mentioned in The Bankruptcy Act, and proof has not been made  
 of any of the facts mentioned in sections 59 or 60 of the said Act,  
 or that the bankrupt (or authorized assignor) has been guilty  
 of any misconduct in relation to his property or affairs.

It is ordered that he be and he hereby is discharged.

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-68,  
 70-77, 80-81. E.F. 109.

### No. 70.

*Order Refusing Discharge.*

(Title.)

On the application of .....  
 (*Commencement as in Form 69.*)

And whereas it has been proved that the bankrupt (or autho-  
 rized assignor) has committed the following offences namely—  
 (*Here state particulars*)

or

And whereas it has not been proved that the bankrupt (or  
 authorized assignor) has committed any of the offences men-  
 tioned in The Bankruptcy Act but proof has been made of the



**Form No. 71** following facts under section 59 of said Act (or/and section 60 of said Act) namely—

(Here state particulars)

or/and that he has been guilty of misconduct in relation to his property and affairs, namely—

(Here state particulars)

It is ordered that the bankrupt's (or authorized assignor's) discharge be and it is hereby refused.

Dated this.....day of.....19...

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-69, 71-77, 80-81. E.F. 110.

### No. 71.

#### Order Suspending Discharge.

#### The Bankruptcy Act.

On the application of .....  
(Commencement as in form 69.)

And whereas it has not been proved that the bankrupt (or authorized assignor) has committed any of the offences mentioned in The Bankruptcy Act (or it has been proved that the bankrupt (or authorized assignor) has committed the following offences namely—(set them out), but the Court has for the following special reasons (state them) determined that his discharge shall not on that ground be absolutely refused; but proof has been made of the following facts under section 59 (or/and section 60) of the said Act.

(Here state particulars)

or/and that he has been guilty of misconduct in relation to his property and affairs, namely—

(Here state particulars)

It is ordered that the bankrupt's (or authorized assignor's) discharge be suspended until a dividend of not less than 50 cents on the dollar has been paid to the creditors, with liberty to the bankrupt (or authorized assignor) at any time after the expiration of one year from the date of this order to apply for a modification thereof, pursuant to section 58.

or

It is ordered that the bankrupt's (or authorized assignor's) discharge be suspended for.....years and that he be discharged as from the ..... day of ..... 19....

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-70, 72-77, 80-81. E.F. 111.



**No. 72.**Forms Nos.  
72, 73

*Order of Discharge where only facts proved that Assets not equal to 50c. on the Dollar.*

The Bankruptcy Act.

On the application of .....

(Commencement as in Form 69.)

And whereas it has not been proved that the bankrupt (*or* authorized assignor) has committed any of the offences mentioned in The Bankruptcy Act, and whereas the only fact under sections 59 and 60 of which proof has been made is the fact that the bankrupt's (*or* authorized assignor's) assets are not of a value equal to 50c. on the dollar on the amount of his unsecured liabilities.

It is ordered that the bankrupt's (*or* authorized assignor's) discharge be suspended for and that he be discharged as from the.....day of.....19...

Dated this ..... day of..... 19...

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-71, 73-77, 80-81. E.F. 112.

**No. 73.**

*Order of Discharge subject to Conditions as to Earnings, After-acquired Property, and Income.*

(Title.)

On the application of .....

(Commencement as in Form 69.)

And whereas it has not been proved (a)

It is ordered that the bankrupt (*or* authorized assignor) be discharged subject to the following conditions as to his future earnings, after-acquired property, and income:—

(a) Here state particulars of the finding of the Court.

After setting aside out of the bankrupt's (*or* authorized assignor's) earnings, after-acquired property and income the yearly sum of \$.....for the support of himself and his family, the bankrupt (*or* authorized assignor) shall pay the surplus, if any (*or such portion of such surplus as the Court may determine*), of such earnings, after-acquired property, and income to the authorized trustee for distribution among the creditors of the estate. An account shall, on the first day of January in every year, or within fourteen days thereafter, be filed in these proceedings and with the trustee by the bankrupt (*or* authorized assignor) and verified by affidavit setting forth



**Form No. 74** a statement of his receipts from earnings, after-acquired property and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the bankrupt (*or* authorized assignor) to the authorized trustee within fourteen days of the filing of the said account.

Dated this .....day of .....19...

**Cross References:** SS. 56-61. RR. 135-144. FF. 66-72, 74-77, 80-81. E.F. 113.

### No. 74.

*Order of Discharge subject to a Condition Requiring the Bankrupt or Assignor to consent to Judgment being entered against him.*

(Title.)

On the application of .....

(Commencement as in Form 69.)

It is ordered that the bankrupt (*or* authorized assignor) be discharged subject to the following condition to be fulfilled before his discharge takes effect, namely, he shall, before the signing of this order, consent to judgment being entered against him in this Court, by the authorized trustee for the sum of \$....., being the balance (*or* part of the balance) of the debts provable in the estate which is not satisfied at the date of this order, and for \$.....cost of judgment.

And it is further ordered, without prejudice and subject to any execution which may be issued on the said judgment with the leave of Court, that the said sum of \$..... be paid out of the future earnings or after-acquired property of the bankrupt (*or* authorized assignor) in manner following, that is to say, after setting aside out of the bankrupt's (*or* authorized assignor's) earnings and after-acquired property a yearly sum of \$.....for the support of himself and his family, the bankrupt (*or* authorized assignor) shall pay the surplus, if any, (*or such portion of such surplus as the Court may determine*), to the authorized trustee for distribution among the creditors in the estate. An account shall, on the 1st day of January in each year, or within fourteen days thereafter, be filed in these proceedings, and with the authorized trustee, by the bankrupt (*or* authorized assignor) setting forth a statement of his receipts or earnings, after-acquired property, and income, during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the bankrupt to the authorized trustee within fourteen days of the filing of the said account.



And it is further ordered that, upon the required consent **Forms Nos.**  
being given, Judgment may be entered against the bankrupt (or **75, 76**  
authorized assignor) in this Court for the said sum of \$.....  
.....together with \$.....for costs  
of Judgment.

Dated this ..... day of .....19...

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-73,  
75-77, 80-81. E.F. 114.

### No. 75.

*Consent of Bankrupt (or Authorized Assignor) to Judgment  
being entered for balance or part of balance of Provable  
Debts.*

(Title.)

Re.....

I, A. B., of .....  
the above named bankrupt (or authorized assignor), do hereby  
consent to Judgment being entered against me in this Court by  
the authorized trustee.....  
for the sum of \$....., being the balance or  
part of the balance of the debt provable under my bankruptcy  
(or under my authorized assignment) which is not satisfied at  
the date of my discharge, together with \$.....  
for costs of judgment, but this consent is subject to the pro-  
vision contained in The Bankruptcy Act with regard to the  
issue of execution on such judgment.

Dated this .....day of .....19...

(Signed) A. B.

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-74,  
76, 77, 80-81. E.F. 115.

### No. 76.

*Judgment to be entered pursuant to the Consent.*

In the ..... Court of .....  
in Bankruptcy

Between:—

(Name of authorized trustee.)

Plaintiff,

AND

A. B.

Defendant.



Forms Nos.  
77, 78

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The ..... day of .....19...

Pursuant to the order made herein and dated the.....  
day of ..... whereby it was ordered that  
(*Recite substance of Order.*)

And the consent mentioned in the said order having been  
given and filed.

It is this day adjudged that the plaintiff recover against the  
said defendant \$....., together with  
\$.....for costs of judgment.

Dated this ..... day of .....19...

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-75,  
77, 80-81. E.F. 116.

---

### No. 77.

*Affidavit by Debtor, whose Discharge has been granted condi-  
tionally as to After-acquired Property or Income.*

(*Title.*)

I, .....  
the above-named debtor, make oath and say as follows:

1. I have since the date of my discharge resided and carried  
on business at .....  
and I now reside and carry on business at .....

2. The statement hereto annexed is a full, true and complete  
account of all moneys earned by me and of all property and  
income acquired or received by me since the date of my discharge  
(or since the date when last I filed a statement of after-acquired  
property and income in Court, namely—the.....day of  
.....19...).

Sworn at, etc.

.....  
*Signature of Debtor.*

**Cross References:** SS. 58-61. RR. 135-144. FF. 66-76,  
80-81. E.F. 117.

---

### No. 78.

*Order Annuling Adjudication under Section 62(1).*

(*Title.*)

On the application of R. S. of .....  
and on reading ..... and .....  
hearing ....., It is ORDERED that the



adjudication of Bankruptcy of the above named ..... **Forms Nos.**  
 .....under Order dated..... **79 to 81**  
 of....., be and the same is hereby  
 annulled.

Dated this ..... day of .....19...

**Cross References:** S. 62. F. 63.

### No. 79.

*Notice of Order Annuling Adjudication under Section 62(3).*  
 (Title.)

TAKE NOTICE that the Order of Adjudication bearing date  
 the .....day of .....19...  
 under which A.B. of .....was  
 adjudged bankrupt has been annulled by Order of this Court  
 dated the.....day of.....19...

Dated at ..... this .....  
 day of.....19...

**Cross References:** S. 62. F. 78.

### No. 80.

*Certificate of Removal of Disqualification.*  
 (Title.)

WHEREAS an order of discharge was, on the.....  
 day of .....A.D. 19..., granted to A.B.  
 the above-named bankrupt (or authorized assignor);

IT IS HEREBY CERTIFIED that the bankruptcy of the said A.B.  
 was caused by misfortune without any misconduct on his part.

Dated this ..... day of .....  
 A.D. 19...

.....  
 Registrar.

**Cross References:** S. 60(3). RR. 135-144. FF. 66-77, 81.  
 E.F. 118.

### No. 81.

*Notice of Discharge of Bankrupt.*  
 (Title.)

TAKE NOTICE that .....  
 the bankrupt (or authorized assignor) was discharged by order



**Forms Nos.** of this Court bearing date the .....  
**82 to 83** day of ..... A.D. 19....

Dated at ..... the .....  
 day of ..... A.D. 19....

.....  
 Authorized Trustee.

**Cross References:** SS. 61(5). RR. 135-144. FF. 66-77, 80.

**No. 82.**

*Taxing Master's Certificate.*

(Title.)

I hereby certify that I have taxed the bill of costs (or charges) (or expenses) of Mr. C.D., (*here state capacity in which employed or engaged*) (*where necessary add* "pursuant to an order of the Court dated the ..... day of ..... 19...."), and have allowed the same at the sum of \$..... (*where necessary add* "which sum is to be paid to the said C. D. by ..... as directed by the said order.")

Dated this ..... day of .....  
 19....

..... Taxing Master (or Registrar)

**Cross References:** RR. 54-61.

**No. 83.**

*Subpoena.*

(Title.)

George the Fifth, by the Grace of God, etc., to (*the names of witnesses may be inserted*) Greeting: We command you to attend before ..... at .....  
 on ..... day the ..... day of ..... 19....,  
 at the hour of ..... in the ..... noon, and  
 so from day to day until the above matter is heard to give evidence on behalf of (*insert name*).

Dated this ..... day of .....  
 19....

.....  
 Registrar.

**Cross References:** RR. 10, 34-36, 120. F. 84. E.F. 141.



## No. 84.

Form No 84

*Subpœna Duces Tecum.*

(Title.)

George the Fifth by the Grace of God, &c., to (*the name of witness may be inserted*) greeting:

We command you to attend before .....  
 at ..... on ..... day the .....  
 day of ..... 19...., at the hour of .....  
 in the ..... noon, to give evidence on behalf  
 of ..... and also to bring with you and  
 produce at the time and place aforesaid (*specify documents to be produced*).

Dated this ..... day of .....  
 19....

Registrar.

Cross References: RR. 10, 34-36, 120. F. 83. E.F. 142.



## PART II.

### TARIFF OF COSTS.

INSTRUCTIONS:		\$ cts.
1	For petition or authorized assignment .....	4 00
2	To defend, oppose or attend upon petition .....	4 00
3	For approval composition, extension or scheme .....	4 00
4	To attend on or oppose or defend any issue .....	4 00
5	For or to oppose notice of motion or application to Court or Chambers .....	4 00
6	For any affidavit .....	2 00
7	For or to answer interrogatories or cross-interrogatories or to examine or attend on any examination of a debtor or of any other person .....	4 00
8	For any judgment or warrant .....	4 00
9	For commission or other like proceeding, or order for evi- dence or examination .....	4 00
10	For brief on any summary hearing, issue, trial or important motion or application .....	5 00
11	To appeal or to oppose appeal .....	4 00
12	For any pleading .....	4 00
13	For any other important step or proceeding in any cause, matter or proceeding not included in the above .....	4 00

### DRAWINGS, PLEADINGS, ETC.

14	Drafting—	
	(a) Statement of claim or defence or any pleadings instructed by the Court or a Judge to be drawn.....	4 00
	(b) Petition .....	4 00
	(c) Issue, composition, extension or scheme .....	4 00
	(d) Any other documents commencing a proceeding not commenced by petition or statement of claim and any document in answer to same .....	4 00
	(e) Record .....	4 00
	(f) Authorized assignment (including two duplicates)....	10 00
	(g) Notice of motion, objections, contestation, etc.....	3 00
15	For every additional folio over ten, per folio .....	0 30
16	Engrossing same and for each copy to file and serve, per folio	0 15
17	Drawing interrogatories or cross-interrogatories, or answers to either of the same, commission, letters rogatory or other document of like nature, per folio .....	0 30
18	Engrossing and for each copy to file and serve, per folio....	0 15

### AFFIDAVITS.

19	Drawing affidavit, per folio .....	0 30
20	Engrossing and for each necessary copy, per folio .....	0 15
21	Preparing exhibits, each .....	0 20

### PERUSALS.

22	Of (a) Statement of claim, defence or other pleading, (b) Petition .....	
	(c) Issue, (d) Any other document commencing a proceeding not commenced by petition or statement of claim and any document in answer to same .....	3 00
23	Perusing any notice of motion, objections, contestations, etc.	2 00
24	Of each affidavit, including exhibits of a party adverse in interest .....	2 00



PERUSALS—*Concluded.*

	\$	cts.
25 Of interrogatories, cross-interrogatories or answers to either of same, or any other document of a similar nature....	3	00
To be increased in the discretion of the taxing officer .....	3	00
26 Of notice to produce or admit .....	2	00
27 Of any important notice or paper not otherwise mentioned..	2	00

## WRITS.

28 All writs, warrants, certificates of judgment and lis pendens, including attendances to issue, register and deliver same.	8	00
29 Renewals of same, including attendances to issue, register and deliver the same .....	5	00
30 Subpœna ad testificandum .....	1	50
31 Subpœna duces tecum .....	3	00
32 For every additional folio over four .....	0	30

## SERVICES.

33 Service of petition, or other document by which any proceeding is commenced .....	3	00
34 If served at over two miles from nearest place of business or office of solicitor serving same, for each mile beyond two, each way .....	0	30
35 For service out of jurisdiction, such allowance as taxing officer thinks proper .....	2	00
36 Attending to serve any other document .....	2	00

## BRIEFS.

37 Drawing brief .....	3	00
38 Every additional folio over five .....	0	30

## COPIES.

39 Copies for petitions, pleadings, notices, demands, minutes, orders, judgments, appointments, subpoenas and any other documents when no other provision is made and copies are properly allowable per folio, for each copy .....	0	15
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## NOTICES, DEMANDS, ETC.

40 Notice to admit or produce .....	1	00
To be increased in the discretion of the taxing officer.		
41 Appointment for examination of debtor witness or for any other purpose .....	3	00
Engrossing and each copy, per folio .....	0	15
42 Notice of trial, hearing of issue, or summary hearing .....	2	00
43 Every notice under any other statute .....	2	00
44 All other notices and demands not above specified including notices to Gazette, newspaper, etc. ....	2	00
45 Every folio over three of any of above .....	0	30

## ATTENDANCES.

46 Attendances consequent on service of notice to produce or admit, or on inspection of documents, or notice under any statute .....	2	00
47 Attendance for special leave for a service of notice of motion or of appeal, in the discretion of the taxing officer ....	3	00
48 On consultation with counsel, where proper in the discretion of the taxing officer .....	10	00
49 Solicitor attending court or chambers, including partner of counsel, when no second counsel fee taxed, per hour....	5	00
To be increased in the discretion of the taxing officer to an amount not to exceed, per hour .....	10	00



ATTENDANCES—*Concluded.*

		\$	cts.
50	To obtain or give undertaking to defend when service accepted by solicitor .....	2	00
51	To file any paper or for any appointment, or to receive, accept or admit service of any paper not otherwise provided for .....	1	00
52	Solicitor attending to procure evidence for the trial or petition, in addition to all proper travelling expenses. Such amount as the taxing officer thinks proper .....	5	00
53	Every other attendance, per hour .....		
	To be increased in the discretion of the taxing officer.		
54	Attendances, correspondences, etc., incurred through negotiations by a defendant creditor or debtor to gain time, or in the endeavour to compromise or settle the action, petition or proceeding. Such allowance as the taxing officer deems proper.		

NOTE:—Throughout this tariff a telephone attendance shall be an attendance.

## LETTERS.

55	Each letter .....	1	00
56	Perusal of each letter .....	1	00
	These two items may be increased in the discretion of the taxing officer.		

## BONDS.

57	Upon giving of any bond in any proceeding, including drawing and engrossing same and all affidavits and copies, and necessary attendances and taking of affidavits.....	15	00
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## JUDGMENT, RULE OR ORDER.

58	Drawing minutes of judgment or order .....	3	00
	For every folio over five, per folio .....	0	30
59	Engrossing judgment roll or order after settlement or minutes, per folio .....	0	15
60	Judgment when no defence and no minutes necessary.....	3	00
61	Appointment to settle or pass judgment or order of court..	1	00
62	Attending to settle minutes .....	3	00
	To be increased in the discretion of the taxing officer in difficult or contested cases.		
63	Attending to enter judgment .....	3	00
64	Attending for any præcipe order .....	1	00
65	Any præcipe order .....	1	00

## PAYMENT INTO OR OUT OF COURT.

66	(a) Instructions to pay into court .....	3	00
	(b) Instructions to obtain moneys out of court .....	3	00
	(c) Præcipe to pay in or obtain out of court .....	1	00
	(d) Attending for direction .....	1	00
	(e) Attending for cheque to pay in .....	1	00
	(f) Attending to pay in or receive cheque in payment out.	1	00
	(g) Præcipe for certificate of accountant .....	1	00
	(h) Attending for certificate of accountant .....	1	00
	(i) Drawing receipt or certificate of bank as to payment in or non-payment in .....	1	00
	(j) Attending to enquire at bank and for certificate.....	2	00

## TAXATION OF COSTS.

67	Drawing bill of costs for taxation, per folio .....	0	30
68	Engrossing and each copy to serve, each per folio .....	0	15
69	Notice of taxation or appointment to tax .....	1	00
70	Every copy, per folio .....	0	15
71	Attending on taxation, per hour .....	5	00



## COUNSEL FEES.

\$ cts.

- 72 Settling—  
 (a) Statement of claim, defence or any other pleading,  
 (b) Petition,  
 (c) Special notice of motion,  
 (d) Interrogatories or answers to same,  
 (e) Cross-interrogatories or answers to same,  
 (f) Issue,  
 (g) Application in connection with any composition, extension or scheme,  
 (h) Any other document or proceeding of like nature to any of the above ..... 10 00  
 Any of the above to be increased in the discretion of the taxing officer.
- 73 Attendance of counsel on—  
 (a) Examination for discovery,  
 (b) Cross-examination on affidavits,  
 (c) Examination of witness on motion,  
 (d) Examination of witness de bene esse,  
 (e) Examination of debtor,  
 (f) Or any similar examination ..... 15 00  
 Any of the above to be increased in the discretion of the taxing officer.
- 74 On consultation with solicitor or client, where proper, in the discretion of the taxing officer ..... 5 00
- 75 Advising on evidence ..... 10 00  
 To be increased in the discretion of the taxing officer.
- 76 Attendance of counsel on adjournment in judge's chambers or on any motion when unopposed ..... 10 00
- 77 Attendance of counsel upon adjournment in judge's chambers when opposed ..... 15 00
- 78 Attendance of counsel upon adjournment before Registrar.. 5 00
- 79 Fee of counsel on ex parte motion or application to Registrar 10 00
- 80 Attendance of counsel on opposed motion or application to Registrar ..... 15 00  
 Both of above items subject to increase in the discretion of the taxing officer.
- 81 Counsel fee on all ex parte motions or applications to court or judge in chambers ..... 20 00
- 82 Counsel fee on opposed motion in court or before judge in chambers ..... 40 00  
 To be increased in the discretion of the taxing officer.
- 83 Counsel fee with brief on—  
 (a) Petition,  
 (b) Trial,  
 (c) Approval of any composition, extension or scheme,  
 (d) Trial of issue,  
 (e) Summary hearing,  
 (f) Application for discharge by trustee or when opposed. 50 00  
 To be increased in the discretion of the taxing officer.  
 For second counsel, two-thirds of the fee allowed to first counsel.
- 84 Counsel fee on settlement or compromise when proceedings have been taken or services rendered by a barrister in or out of court to expedite proceedings, save costs, to compromise or settle actions, proceedings or claims, or in negotiations leading up to a compromise or settlement, a counsel fee or allowance may be made therefor in the discretion of the taxing officer, which may be by way of commission or percentage on the amount recovered or defended, or on the value of the property about which the action, suit, claim or transaction is concerned, or the same may be made by way of quantum meruit for the services rendered or upon such other basis as the taxing offices thinks proper.



COUNSEL FEES—*Concluded.*

- |   |            |
|---|------------|
|   | \$    cts. |
| 85 In all cases of fees or allowances which are in the discretion of the taxing officer or which may be increased in the discretion of the taxing officer, the taxing officer shall have regard to all the circumstances including (but not in any way restricting the generality of the foregoing), the nature, importance or urgency of the matters involved, the time occupied, the circumstances and interest of the person by whom the costs are payable, the general conduct of the proceedings, and the amount, skill, labor and responsibility involved, and the preparation and consideration of any written argument when requested by a judge. |            |
| 86 In case of any service rendered in any action or proceeding of a like nature to any of the services provided for in this tariff and not expressly covered by any item in the tariff, a fee shall be allowed by the taxing officer of an amount equal to the tariff fee for the services most nearly resembling the one in question.  |            |
| 87 In all cases of fees or allowances which may be allowed in the discretion of the taxing officer or which may be increased in his discretion, there shall be a right of appeal to a judge in chambers and the fee or allowance so made or increased shall be reconsidered by such judge, whether the exercise of the discretion pertains to the quantum of fees or relates to a question of principle.  |            |
| This right shall be in addition to any existing right of appeal.  |            |

## SOLICITORS' FEES ON COLLECTION OF ACCOUNTS.

- 88 Claims collected after notice or demand and enter as a whole or in instalments:—
- |   |     |
|---|-----|
| on first \$300 or less .....                                      | 15% |
| on excess over \$300 up to \$1,000 .....                          | 8%  |
| on over \$1,000 .....   | 4%  |
| minimum charge, \$5.  |     |
| on claims less than \$10 charge not to exceed one-half the claim. |     |

Where no collection made, no charge.

## ALLOWANCE TO WITNESSES.

- |    |  |      |
|----|--|------|
| 89 | To witnesses residing within five miles of the court house where action is tried, or the place at which they are required to attend, for each day's attendance.....  | 3 00 |
| 90 | To witnesses residing more than five miles from the court house where the action is tried, or the place at which they are required to attend, for each day's attendance..  | 5 00 |
| 91 | To barristers, solicitors, civil, mechanical and electrical engineers, architects, chartered accountants, dentists, dental surgeons, physicians and surgeons, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinions for each day's attendance ..... | 6 00 |

In addition to the foregoing fees, the travelling expenses of witnesses residing more than five miles from the court house where the action is tried, or the place at which they are required to attend, shall be allowed according to the sums actually and reasonably expended, but shall in no case exceed twenty cents per mile one way.



### PART III.

#### SCALE OF FEES.—PAYABLE ON PROCEEDINGS.

	\$	cts.
Issuing and filing of every bankruptcy petition, including the sealing thereof and one duplicate or copy .....	5	00
Filing and approving every bond, with or without sureties, including affidavits; or memorandum as to payment into Court, including such payment in .....	2	50
Every receiving order, excepting an order for interim receiver..	5	00
Every interim receiving order .....	2	00
Every other order .....	2	00
Every application to approve a composition extension or scheme.	5	00
Every application for an order for discharge .....	5	00
Every other notice of motion or application filed, including notice of appeal .....	2	00
Every affidavit filed .....	0	20
Every subpoena or warrant .....	2	00
Every lis pendens .....	2	00
Every statement of affairs, filing .....	1	00
For filing any other document or proceeding not otherwise particularly provided for .....	0	20
For making copies or certified copies of any proceeding, per folio of 100 words .....	0	15
Taxation of costs, per hour. (Including taxing officer's certificate) .....	5	00
For the registrar holding examinations or hearing appeals under section 65 of the Act, per hour .....	2	00
Bailiff for serving petition, subpoena, order or other proceeding including affidavit of service .....	3	00
Mileage both ways, per mile .....	0	20
Possession under a warrant for each day a man is actually in possession . . . . .	5	00
No fees shall be charged for searching any proceedings or documents required, under the Act or these Rules, to be filed with the registrar .....		







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